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Supreme Court of the United States

OCTOBER TERM, 1952

No. 540

UNITED STATES OF AMERICA, *Petitioner*

v.

HARRY GRAY NUGENT, *Respondent*

No. 573

UNITED STATES OF AMERICA, *Petitioner*

v.

LESTER PACKER, *Respondent*

ON CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT BRIEF FOR RESPONDENTS

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A study of legislative history of the 1940 and 1948 acts shows a fair and just treatment intended for conscientious objectors. It shows that the term "appropriate inquiry and hearing" was used. A "fair hearing" was implied by the term "hearing". There is nothing explicit or implicit in the acts or the history of them that authorizes the procedure of withholding the F.B.I. report. The use of the word "hearing" implies a full and fair hearing. This commands production of the F.B.I. report. 32-98

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 540

UNITED STATES OF AMERICA, *Petitioner*

v.

HARRY GRAY NUGENT, *Respondent*

No. 573

UNITED STATES OF AMERICA, *Petitioner*

v.

LESTER PACKER, *Respondent*

ON CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT BRIEF FOR RESPONDENTS

Opinions Below

United States v. *Nugent*, 200 F. 2d 46. [N 57-63][1] *United States* v. *Packer*, 200 F. 2d 540. [P 49-51][2]

[1] Figures appearing in brackets preceded by the letter "N" refer to the pages of the printed record in the *Nugent* case.

[2] Figures appearing in brackets preceded by the letter "P" refer to the pages of the printed record in the *Packer* case.

Jurisdiction

The judgment of the court of appeals in the *Nugent* case was entered November 10, 1952. [N 63] On December 5, 1952, Mr. Justice Jackson extended the time for filing petition for certiorari until January 9, 1953. [N 64] On March 16, 1953, certiorari was granted. [N 64]

The judgment of the court of appeals in the *Packer* case was entered December 31, 1952. [P 51] Certiorari was granted on March 16, 1953. [83]

Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

Questions Presented

Section 6 (j) of the Selective Service Act of 1948 provides that a person whose claim for exemption from service as a conscientious objector has been rejected by his local board may appeal to an appropriate appeal board. The appeal board is to refer the claim to the Department of Justice, which, after appropriate inquiry, is to hold a hearing and then make a recommendation to the appeal board. The appeal board considers (but is not bound to follow) that recommendation in reaching its decision.

The facts established by the undisputed evidence show that there were extensive F.B.I. reports made when respondents' cases were investigated by the Department of Justice. These F.B.I. reports were referred to and used by the hearing officers following hearings conducted by them and before their reports were made. The F.B.I. reports admittedly were not furnished to registrants by the hearing officers and were not included in the draft board files when the reports of the hearing officers and the recommendations of the Department of Justice were made to the appeal

boards and the draft board files returned to the appeal boards.

There was no request made by Nugent that he be given the F.B.I. report. Packer asked that the evidence in the F.B.I. report be shown to him. He was informed that the report had nothing in it unfavorable. The hearing officer in each case recommended against the conscientious objector claim because of the information appearing in the F.B.I. reports not made available to respondents.

The questions presented, therefore, are:

(1) Whether the failure to produce the secret F.B.I. reports so that respondents could answer them and the failure of the Department of Justice and the Selective Service System to include the reports in the draft board files violated the act, the regulations and the Fifth Amendment to the United States Constitution.

(2) Whether Section 6 (j) of the Selective Service Act of 1948, providing for investigation and appropriate inquiry, the Selective Service Regulations and the due-process clause of the Fifth Amendment to the United States Constitution, require the hearing officer of the Department of Justice to place every F.B.I. report used by him, favorable or unfavorable to the registrant, in the selective service file of the registrant.

(3) Whether the judgment of the court below in each case, regardless of the correctness of the opinion of the court below on the above questions, should be affirmed because of the invalidity of the classifications and the proceedings and the report and conclusions of the hearing officer of the Department of Justice and the Deputy Attorney General.

(4) Whether the trial court in the *Packer* case committed reversible error in quashing the subpoena duces tecum and declining to compel the production of the F.B.I. report.

Statute and Regulations Involved

Section 6 (j) of the Selective Service Act of 1948 (62 Stat. 609, 50 U. S. C. App. 456 (j)), provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscien-

tiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—62 Stat. 609, 50 U. S. C. App. § 456 (j).

Section 13 (b) of the Selective Service Act of 1948 (62 Stat. 623, 50 U. S. C. App. 463 (b)), provides:

"All functions performed under this title shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 of such Act."

Section 3 of the Administrative Procedure Act (5 U. S. C. 1002) provides:

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency— . . . (c) *Public Records.*—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

The Selective Service Regulations, 32 C. F. R. Section 1622.20 (a), provide:

"In Class IV-E shall be placed any registrant who, by reason of religious training and belief, is found to be conscientiously opposed to participation in war in any form and

to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

The Selective Service Regulations, 32 C. F. R. Section 1626.25 (c), (d), provide:

"(c) The Department of Justice shall . . . make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

As amended by Section 1 (q) of the Universal Military Training and Servite Act of June 19, 1951 (65 Stat. 75, 86, 50 U. S. C. App., Supp. V, 456 (j)), Section 6 (j) of the Act of 1948 differs from the original provision quoted in the text in respects which are here immaterial.

Section 6 (j) of the Selective Service Act of 1948 pro-

vided that persons claiming exemption as conscientious objectors could either be ordered to perform noncombatant military service (the type for which Nugent was classified or, if the objections were found to preclude such service, be deferred. As amended by the Universal Military Training and Service Act of June 19, 1951, Section 6 (j) no longer provides for deferment, now specifying either noncombatant service or compulsory performance of "civilian work contributing to the maintenance of the national health, safety, or interest . . . "

As amended in 1951 by the Selective Service Regulations, Section 1622.14, registrants found to be opposed to combatant and noncombatant military service are placed in Class I-O.

Section 1622.20 (a) of the regulations applies to the classification given to Nugent. This regulation applies to Nugent because he was finally classified before June 19, 1951. The classification of Packer, however, is governed by the amended regulation, Section 1622.14.

Constitutional Provisions Involved

Amendment V to the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of Cases

Nugent

During September, 1948, respondent registered. He filed a questionnaire dated February 2, 1949. [N 4] In his questionnaire he claimed conscientious objection to combatant military service. [N 4, 33] He stated that he would serve in the armed forces as a noncombatant conscientious objector. [N 4, 31] The local board failed to mail respondent the special form for conscientious objector (SSS Form No. 150) promptly but delayed the mailing of it for a period of twenty months. [N 4, 13, 21, 32]

Contrary to the statement appearing in the questionnaire that he would serve in the armed forces as a noncombatant [N 4, 31], respondent indicated in the conscientious objector form that he was opposed to both combatant and noncombatant service. [N 22-38] He explained that from the time he made his statement in the questionnaire in 1949 to the time that he filed his special form for conscientious objector in October, 1950, he had increased in his study and conviction of his religion, which made it impossible for him to serve as a noncombatant in the armed forces. [N 17-18, 23-26, 49-50]

On October 25, 1950, following the receipt of the special form for conscientious objector and supporting proof, the local board classified Nugent in Class I-A. [N 4-5] He was mailed notice of this classification. [N 5] On November 4, 1950, he requested a personal appearance. [N 5] Thereafter he had a physical examination and was found acceptable. [N 5] Nugent was notified to appear before the local board on February 1, 1951, for his hearing. [N 5] Following the personal appearance he was placed in Class I-A-O (noncombatant conscientious objector classification) making him liable for service in the armed forces. On February 5, 1951, he was notified of this classification. [N 6]

Nugent appealed from this classification. [N 6] The appeal board tentatively denied his claim for classification as

a full conscientious objector (IV-E) and referred the case to the Department of Justice for investigation and hearing pursuant to Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25). [N 7]

After the investigation by the Federal Bureau of Investigation of Nugent's claim as a conscientious objector, the case was referred to the hearing officer for a hearing. [N 46] The hearing officer notified Nugent to appear before him. [N 9] Accompanying the notice were printed instructions dated September 1, 1948. [N 9, 54] The instructions notified Nugent that the hearing officer would inform the registrant of the general nature and character of any evidence adverse to his conscientious objector claim. [N 54] The notice stated that the registrant could make a full presentation at the hearing and bring witnesses. [N 54] The hearing was fixed for July 26, 1951. [N 15]

Pursuant to the instructions Nugent went to the office of the hearing officer and requested the adverse evidence. [N 10] The secretary of the hearing officer informed him that the "F.B.I. records are favorable" and that Nugent would have no trouble in getting his conscientious objector status. [N 10, 21] When asked by the secretary if he was going to bring an advisor, he informed her that since the F.B.I. records were favorable he saw no need of it. She responded, "That is right, because I feel you should have no trouble in receiving your desired classification because of the good recommendation from the F.B.I." [N 10-11] Because of this, Nugent thought that it would be unnecessary to have anyone present to assist. [N 10] Because of the representation and good-faith belief, Nugent's advisor, Martin Mitchell, who would have corroborated his conscientious objector claim, did not attend the hearing. [N 12]

At the time fixed for the hearing Nugent appeared. [N 12] He was prevented by the hearing officer from making a full statement of his claim, being cut off and told to answer questions with yes or no. [N 12] At the hearing the hearing officer did not mention the F.B.I. report or any adverse

statements appearing therein. [N 13, 46] The hearing officer had a stenographer present making a record. [N 15] The stenographic report of the hearing appears in the appendix to the brief for the petitioner. In the report of the hearing officer made to the Department of Justice reference is made to the religious group to which Nugent belonged. The hearing officer said: "Apparently each member is entitled to his own belief. Registrant's belief seems to be a free and particularly easy belief and religion, calling for little effort and practically no sacrifice." [N 46] This information must have come to the attention of the hearing officer through the F.B.I. report because it was not touched upon at the hearing. (See appendix to the brief for the petitioner.) There was no proof of this in the conscientious objector form or the documents submitted. [N 39-45] The hearing officer then added that Nugent's references "failed to make favorable impression, and most of them were conscientious objectors themselves". [N 46] This statement must have come from the F.B.I. report because none of the references appeared before the hearing officer but were interviewed by the agents of the F.B.I.—See appendix to the brief for the petitioner.

The hearing officer refers to "impressions gleaned as to" Nugent. He added that Nugent was "apparently shiftless, lazy, somewhat of a moral weakling . . . ". [N 47] This information also must have come to the hearing officer's attention through the F.B.I. reports because it appears neither in the minutes of the hearing nor the papers submitted by Nugent. [N 32-45]—Appendix to the brief for petitioner.

The hearing officer impeached all of the statements made by Nugent and his references because none of them were made "prior to the national emergency" and, because of this fact, found that Nugent's claims "are not founded on truth in fact". [N 47] Notwithstanding his belief that the registrant should be denied both the conscientious objector

classification to combatant military service (I-A-O) and to noncombatant military service (IV-E) making him liable for full military service and a classification of I-A, the hearing officer recommended that Nugent be put in Class I-A-O solely because the local board had placed him in that classification. [N 47]

The recommendation of the Special Assistant to the Attorney General, based on the report of the hearing officer and the secret police investigative report, recommended that the registrant's claim "be sustained as to combatant military service only, and the registrant if inducted into the land or naval forces be assigned to noncombatant duties". [N 46] The Special Assistant to the Attorney General referred specifically to the secret police report made by the F.B.I., stating that Nugent, according to the report, is "inclined to be lacking in ambition". [N 47-48]

The appeal board classified Nugent in Class I-A-O. [N 8] He was notified to report for induction. [N 8] He reported and refused to submit, for which refusal he was indicted and convicted in the district court. [N 3]

Respondent appealed. [N 1] The court of appeals reversed the conviction because of the failure to produce the F.B.I. report and make it a part of the draft board file. [N 57-63] The judgment was reversed. [N 63] Petition for writ of certiorari in this case was timely filed.

Packer

In September of 1948 respondent registered with Selective Service Local Board No. 22, the Bronx, New York. A classification questionnaire was mailed to respondent, July 19, 1949. [P 13] It was returned by him on August 29, 1949. [P 13] The questionnaire showed his name and address. [P 53] It showed he had no previous military service. [P 54] It showed that he had never been married. [P 55] He worked at the millinery manufacturing concern of Gladys & Belle, Inc., as a purchaser of supplies. [P 55] He

showed that he had completed seven years of elementary schooling, three years of junior high school and was graduated from high school. In addition to this he showed that he had attended the City College of New York, taking a course of study in merchandising. [P 57] He is a United States citizen, having been born at New York on April 4, 1929. [P 57]

Respondent failed to sign Series XIV of the questionnaire requesting the local board to send him a conscientious objector form. [P 13, 14, 58]

On September 28, 1949, respondent was placed in Class I-A by his local board. [P 59] He neither appealed nor requested a personal appearance within the ten-day time limit fixed by the regulations. No further action was taken in his case by the local board until September 27, 1950, when he was ordered to report for a physical examination on October 4, 1950, He reported and was found physically acceptable. [P 14, 15, 59]

Sixteen days later the local board mailed him notice of classification (SSS Form No. 110), a card containing the usual notice. [P 14] On that same day, October 20, 1950, respondent requested a conscientious objector form. [P 15, 61] On October 23, 1950, the conscientious objector form was mailed to the registrant. [P 15, 59] On October 31, 1950, respondent returned the conscientious objector form properly filled out. [P 15, 59, 62-70]

He signed Series I (B) certifying that by reason of religious training and belief he was conscientiously opposed to participation in war in any form and that he objected to combatant and noncombatant military service. [P 62] He showed that he believed in a Supreme Being. [P 62, 64] He referred to his belief as a "code of morals" that may "very well stem from this Supreme Being". [P 64] He showed that his religious training in early years included a study and belief of the "ten commandments and religious prayer". [P 64] He stated that his belief he inherited as a

part of his nature and stated that "it is a part of this Super Natural force". [P 65]

Respondent explained fully the nature of his beliefs, showing that they are based on the Bible. [P 66-68] He did, however, also cite incidentally a Chinese philosopher on human nature, stating that human nature was inherently good and that if it remained good men would do no evil. He stated that the Chinese philosopher said "if men become evil it is not the fault of their original endowment". [P 65]

He further stated that "no man has the right to take the life of another human being regardless of circumstances. We are put on the earth by the will of God and by the will of God shall we depart". [P 68]

Respondent also gave references. He stated that he had never been a member of a military organization. He added that he was not a member "of a religious sect or organization". [P 69-70]

Two days after the conscientious objector form was received on November 2, 1950, the local board ordered that there would be no reopening of Packer's case. [P 15-16, 71] On November 7, 1950, Packer wrote a letter requesting a personal appearance or hearing out of time, in which letter he stated that he would welcome an F.B.I. investigation on his conscientious objector claim. [P 16, 71] The local board on November 16, 1950, denied the request for hearing. [P 16, 72] The next day the local board ordered respondent to report for induction on December 5, 1950. [P 16-17, 59]

On November 22, 1950, Col. Cobb, New York City Director of Selective Service, called in Packer's file for review. [P 59] The City Director on November 24, 1950, notified the local board that the mailing of the conscientious objector form to Packer and his returning it to the board should have reopened his case. The City Director informed the local board that they should have reclassified him and mailed him a new notice (SSS Form No. 110). The City Director, with a view to preserving the rights

of respondent, ordered the local board to send the file to the appeal board. [P 17-18, 72-73] The local board ordered the induction of Packer postponed on December 5, 1950. [P 18, 59, 73]

On December 6, 1950, the local board and the appeal agent reviewed respondent's file. [P 18, 59] The next day the file was sent to the appeal board. [P 18, 59] The appeal board on receipt of the file and review of it preliminarily denied the claim and referred the file to the Department of Justice for an appropriate inquiry and hearing on the conscientious objector claim. [P 18, 59, 74]

Four months later, on April 9, 1951, following the secret investigation conducted by the F.B.I., Packer was notified to appear before the hearing officer for an inquiry as to his conscientious objections. On April 9, 1951, respondent, on receipt of the notice and accompanying instructions, wrote the hearing officer a letter requesting to be provided with any unfavorable evidence. [P 18, 74-75] (The notice that the hearing officer mailed to the respondent invited him to request the hearing officer to provide the nature and character of any unfavorable evidence.) The hearing officer replied that he found no unfavorable evidence in the secret investigative report of the F.B.I. [P 43]

Respondent appeared before the hearing officer on May 7, 1951, the date fixed for the hearing. [P 40] The stenographic report made of the hearing showed that he informed the hearing officer that he went to a religious school until he was thirteen. Then he received his confirmation or his Bar Mitzvah. [P 44] He described his beliefs as the results of the Hebrew instruction received, that all humans are naturally good and that God is not only external but is also internal. [P 44] He stated that it is something "I have slowly developed within myself" and that it was basic in him. [P 45] As to his particular objections to participation in war he stated that he relied upon the commandment to love his neighbor and that he believed the commandment, "Thou shalt not kill." [P 45]

Respondent also informed the hearing officer that he would be willing, as a conscientious objector, to "assist in any welfare organization that the Government might establish, any humanitarian organization, rehabilitation work". He said: "I would be willing to give my service in anything that will be creative but not destructive." [P 46] The hearing officer asked him if he would be willing to participate in noncombatant service in the army. He stated that he would not. [P 46]

The hearing officer inquired of Packer why it was that he did not certify that he was a conscientious objector in his questionnaire and waited a year to request the conscientious objector form. [P 45] He stated that at the time he filed the questionnaire he intended to claim the conscientious objector status. He added that his friends advised him that he might not pass his physical examination and that if he made a conscientious objector claim he would be looking for trouble from the board. He stated: "Not knowing the procedure of a conscientious objector and not realizing that my rights would expire after a certain time, I took this advice." [P 45]

The hearing officer stated that, since the board had allowed him to make his claim, "that part of it is all right." [P 45] The hearing officer received from Packer verification of his conscientious objector status signed by two witnesses. [P 19, 46] Upon receipt of these he said: "There is nothing derogatory to you, Mr. Packer, in the FBI report; there is nothing you have to meet, employment record is favorable and your friends and neighbors seem to confirm your attitude." [P 46]

The report of the hearing officer to the Department of Justice found that respondent believed in a Supreme Being and that he had been trained in the "Decalogue and religious prayer as well as moral training from his parents". [P 40] He reviewed the report of the F.B.I. briefly. [P 40, 41] He referred to the written statement produced by respondent supporting his conscientious objection at the hearing.

[P 41]. He referred to respondent's religious schooling and quoted respondent as saying: "I had never really gone along with the ritual of my religion." [P 41] He referred to the description by respondent of his religious views supporting conscientious objection. [P 41-42] He repeated the explanation given by respondent of his delay in demanding the conscientious objector form. [P 42].

The hearing officer concluded that the Jewish religion was "not opposed to military service and it is quite speculative to assume that such training forms the basis of unwillingness to participate in war in any form". [P 42]

He then added that he gave "no significance or weight to the fact that no statement of conscientious objection was made" in the questionnaire. The hearing officer said finally that respondent failed to establish that his objection "arises from religious training and belief". [P 42] He recommended that Packer be denied the conscientious objector claim and be placed in Class I-A. [P 42]

The Deputy Attorney General, on review of the draft board file, the secret F.B.I. report and the report of the hearing officer, recommended to the appeal board that respondent's claim as a conscientious objector be rejected because his beliefs "are based upon philosophical or sociological grounds or upon a person[al] moral code". [P 75] He added that he concurred in the recommendation of the hearing officer. [P 75]

On August 20, 1951, respondent was placed in Class I-A. [P 20, 76] He was notified of this classification on August 24, 1951. [P 21] An order to report for induction on September 14, 1951, was issued on August 30, 1951. [P 21] On that date respondent wrote a letter to General Hershey requesting a review of his file and an appeal to the president. [P 21]

76-78] On September 6, 1951, the local board wrote respondent that on August 30, 1951, they had reviewed his file again and again refused to reopen his case. [P 21, 78]

The City Director of New York, on September 6, 1951, wrote Packer that he refused to appeal the case to the president. [P 21, 79] On this same day the National Director, General Hershey, called the file in for review. [P 22, 80-81] Pending this review respondent was informed not to report for induction. [P 22] On September 14, 1951, his induction was postponed to October 16, 1951. [P 22] On October 2, 1951, the National Director notified Packer that no action would be taken on his request for an appeal to the president. [P 82-83] On October 16, 1951, he reported for, but refused to submit to induction, signing a statement certifying to his refusal. [P 23]

On November 19, 1951, by indictment in one count, he was charged with refusing to submit to induction. [P 1-2] Following a subpoena duces tecum issued by the respondent. He also made a motion to inspect the F.B.I. report. [P 2, 3-5] The Government moved to quash the subpoena duces tecum. [P 5-7] Respondent opposed the motion. [P 7-9] The motion to quash the subpoena was granted. [P 10] An order was made denying respondent the right to inspect the F.B.I. report before trial. [P 9]

Respondent waived the right of trial by jury. [P 10-11] Evidence was received. [P 10-34] Respondent was sentenced to the custody of the Attorney General for a period of four years. [P 39] Judgment and commitment was entered. [P 46] Respondent appealed. [P 47] The court of appeals reversed the conviction because of the failure to produce the F.B.I. report and make it a part of the administrative proceedings. [P 49] The judgment was reversed. [P 51] Petition for writ of certiorari in this Court was timely filed.

Summary of Argument

One

A reasonable construction of Section 6 (j) of the Selective Service Act of 1948 requires access by the registrants to the investigative reports made by the Federal Bureau of Investigation.

A. Study of legislative history of the 1940 and 1948 acts shows a fair and just treatment intended for conscientious objectors. It shows that the term "appropriate inquiry and hearing" was used. A "fair hearing" was implied by the term "hearing". There is nothing explicit or implicit in the acts or the history of them that authorizes the procedure of withholding the F.B.I. report. The use of the word "hearing" implies a full and fair hearing. This commands production of the F.B.I. report.

Section 6 (j) of the act provides for the conscientious objector status. The classification is substantially the same as Section 5 (g) of the 1940 act. Hearings were had on Senate Bill 2655. Reports were made on the bill. In neither the hearings nor the reports is reference made to the hearing procedure prescribed by the Department of Justice. Congress concerned itself with two proposed changes in the act. One was that the presidential appeals be decided by a civilian agency separate from the National Director of Selective Service. This change carried; the National Selective Service Appeal Board was created.

The other suggested change was that the conscientious objector claims be taken entirely out of the hands of the Selective Service System and the Department of Justice. The proposed change advocated that the investigation and

[2] Relevant law review articles on some of the problems presented by these two cases are: (1) a note entitled "Validity of Confidential F.B.I. Report in Conscientious Objector Classification", 101 U. of PA. L. REV. 692-700; (2) an article entitled "Government Immunity from Discovery", 59 YALE L. J. 1451-1466; and (3) a note entitled "The Touhy Case: The Governmental Privilege to Withhold Documents in Private Litigation", 47 NW. U. L. REV. 519-530.

classification of conscientious objectors be given to a separate and distinct agency. This proposal was rejected.

In the debates no discussion was had on the hearing procedure. It was referred to incidentally by Senator Gurney who opposed creating the separate conscientious objector agency. He said: "What we are after really are the facts and the Department of Justice has always shown itself perfectly capable of uncovering the facts."—94 Cong. Rec. 7305.

There was no comment whatever by any member of either house on the practice of the Department of Justice in withholding from the conscientious objector and the appeal board the secret police report prepared by the F.B.I. None of the reports referred to this practice.

Report No. 1268, 80th Congress, Second Session, dated May 12, 1948, accompanying Senate Bill 2655, stated that classification of registrants would be "in accordance with a just system of selection". (§ VII (c)) Section 1 (c) of the act itself specifically provided for the fair and just system of selection intended by Congress.

Section VI of Senate Bill No. 1268, 80th Congress, Second Session, accompanying Senate Bill 2655, states that the 1948 act was intended to be substantially the same as the 1940 act. A consideration of the background of the 1940 legislation fails to throw any light on this subject. There is revealed no statement one way or the other on the use of the secret F.B.I. report. The hearings and the reports on the 1940 act describe the procedure briefly. The Department of Justice procedure is referred to in comments by members of Congress, the reports and the act. They mention "appropriate inquiry" and "hearing". There is no mention anywhere of a restricted "hearing". There is nothing said from which it can be inferred that the F.B.I. reports were intended to be withheld from the registrant and the appeal board.

The regulations promulgated by the president for the Selective Service System provide for no consideration of

secret evidence. These regulations command that the draft boards make available and a part of the records all evidence considered. (32 C. F. R. §§ 1621.8, 1623.1 and 1626.24) These regulations are a mere verbatim repetition of the regulations under the 1940 act.

However, from the inception of the Department of Justice procedure for "appropriate inquiry and hearing" the secret police report prepared by the F.B.I. on investigations of conscientious objector claims was withheld. (See 40 Op. A. G. No. 8 (1941).) The reports were held to be confidential under Order No. 3229 issued pursuant to R.S. 161 (5 U. S. C. 22).

The procedure followed by the Department of Justice on each claim of a conscientious objector referred to it by the appeal board will now be stated. The file is referred by the appeal board to the United States Attorney in the district where the appeal board is located. The United States Attorney then passes the file to the Department of Justice. The F.B.I. conducts the usual investigation.

The written report of the investigation by the F.B.I. is not restricted by rules of law. It includes hearsay, rumor, gossip, definite and indefinite information and conclusions. It contains also the names and addresses of the informants.

On the completion of the investigation the file and report are turned over to a district hearing officer of the Department of Justice. He notifies the registrant to appear for hearing. With the notice are also sent instructions.

Originally these instructions provided that the claimant be furnished with the general nature of unfavorable evidence upon request. This was available before hearing. The procedure was changed, shortly after the 1940 act went into effect. No longer was the adverse evidence provided by the hearing officer before the hearing, even when requested by the registrant. Arrangements were made (which is the procedure now) for the hearing officer to state generally the nature of the information that is unfavorable. No summary of the derogatory material is

made and provided to the registrant. Neither the F.B.I. report itself nor the names and addresses of the informants are given to the registrant.

The above procedure was well known to conscientious objectors under the 1940 act. Whether it was known by Congress or not cannot be determined. The enactment of the 1948 act, repeating as it did the substance of the 1940 act, cannot be taken as implicit approval of the procedure under the 1940 act by the Department of Justice withholding the F.B.I. report from the registrant and not including it in the files of the draft board. The suggestion that Congress approved the use of secret evidence by the Department of Justice is rejected by Section 3 (c) of the Administrative Procedure Act, Section 13 (b) of the Selective Service Act of 1948 and the provision in the act for a system of selection of registrants for service that is fair and just.

The use of the word "hearing" in the act without any restrictions dispels any thought that the star-chamber proceedings were approved by Congress. Congress knew that due process of law, guaranteed by the Fifth Amendment, requires revelation to the registrant of the complete F.B.I. report, since it was available and used by the hearing officer. Congress did not, therefore, intend to restrict the law on full and fair hearings in administrative agencies in the face of requirements for due process of law.

There is no justification for the procedure adopted by the Department of Justice. Investigation of conscientious objector claims is not like others made by the F.B.I. in criminal cases. The reason for nondisclosure of the names and addresses of informants in pre-sentence investigation reports made to judges in criminal cases does not exist. No danger to the country's national or international security inheres in conscientious objector investigations. These investigations are like any other administrative determination. The fact that investigation by the department is provided for in the draft law, an emergency measure,

does not alone make it the subject of national or international secrecy. No legal basis exists for sustaining the claim of privilege urged by the Department of Justice.

Every reason exists why there has been a waiver of the privilege. The appeal board relies on the recommendation of the department. The recommendation of the department is based on the report of the hearing officer. Both the recommendation of the department and the report of the hearing officer are grounded on the secret police report made by the F.B.I. Each had the full report in making recommendations.

It was withheld from the appeal board and the registrant. The denial of the conscientious objector claim by the appeal board results in liability for the training and service. The refusal to do training in the armed forces produces the prosecution. The missing link in the chain of proceedings is the F.B.I. report. This broken link destroys the due process required by the law, the act and the Constitution.

The departmental procedure for giving notice of the general nature of the derogatory information in the F.B.I. report to the registrant by the hearing officer does not comply with the law. It does not meet the requirements of due process. Rarely, if ever, is enough substance found in the notice to enable the registrant to answer and defend. It is never granted unless requested. Then it comes only at the hearing. No chance to prepare for the hearing on it is given. Registrants are not lawyers. Conscientious objectors are not trained in the proper procedure. They are not in a position to cope with the adverse evidence withheld by the hearing officer and used by him in recommending a denial of their claims.

The only thing that will satisfy the demands of a full and fair hearing envisioned by Congress is to give the full F.B.I. report to the registrant. It is for the registrant to decide what evidence in the F.B.I. report needs rebutting.

The prescribed procedure was not followed by the hearing officer in either the *Nugent* or the *Packer* case.

Both Nugent and Packer were unable to answer the adverse evidence at the hearing. They were unprepared for the departmental hearing. This was not because of their own fault, but because the act and the Constitution were not complied with by the Department of Justice.

Since Congress failed to explicitly approve the F.B.I. withholding procedure it must be assumed that the term "hearing" employed by Congress meant a full and fair hearing. A full and fair hearing is not had until the claimant is given an opportunity to rebut adverse evidence.

He also has the right to make use of any favorable evidence appearing in the F.B.I. report. The report is not solely for the benefit of the prosecutor. Congress intended that favorable and unfavorable facts be given to the appeal board. The appeal board has the responsibility of making the determination. This moral and legal obligation cannot be discharged if the investigator and the prosecutor, the Department of Justice, withhold from the tribunal a huge and vital chunk of the record or evidence. It seems plain that, although Congress was silent, it was not intended to approve the illegal star-chamber proceedings arranged by the Department of Justice.

B. The weight of authority in the decisions in point that deal with departmental Order No. 3229, forbidding disclosure of the confidential records, holds that the privilege of the F.B.I. must yield where the secret evidence is relied upon in reaching the determination.

Decisions on the point are not novel to administrative law. It is, however, new to find it decided in selective service cases. That the point was not raised in selective service cases until recently means nothing. No defense was permitted by the courts under indictments charging violations of the 1940 act until after the war was over.

Compare *Falbo* v. *United States*, 320 U. S. 549, with *Estep* v. *United States*, 327 U. S. 114. Since judicial review was possible and available under the 1948 act this point was raised timely.

The first case to be decided on the question of statutory construction was *United States* v. *Geyer*, 108 F. Supp. 70 (D. C. Conn. Oct. 10, 1952). This case was however, later than *United States* v. *Oller*, 107 F. Supp. 54 (D. C. Conn. July 28, 1952), holding that constitutional requirements of due process were violated by withholding the F.B.I. report. The *Geyer* case held that the report had to be produced because it was required by the act. The court held that a full and fair hearing and a fair and just method of selection (terms used in the act) compel the production of the report and its inclusion in the file. This same holding was followed by the court below in these two cases.

Imboden v. *United States*, 194 F. 2d 508 (6th Cir.), certiorari denied 343 U. S. 957, (decided before these cases) is not directly in point. In that case the court found that the F.B.I. report was made available to the registrant. The only objection was that the names and addresses of the informants were not disclosed. Here the complaint is much broader. It is that the secret evidence and information gathered by the F.B.I. in the police report illegally forms a basis for the classification. It is contended here that the use of secret evidence violates a full and fair hearing. This complaint was not made in the *Imboden* case (194 F. 2d 508).

The *Imboden* decision, even if found to be in point, is considered to be erroneous. It is subject to the same flaw as the withholding of secret evidence. There cannot be a proper defense or rebuttal to evidence without the source of the information being determined. Unless and until the evidence can be identified the registrant is completely in the dark. To be kept in the dark by a governmental agency is a violation of due process. It conflicts with the pro-

cedural rights guaranteed by a full and fair hearing intended by Congress.

Imboden v. *United States*, 194 F. 2d 508 (6th Cir.), is based on two fallacies. One is that the registrant has no constitutional right to the conscientious objector claim. The other is that the recommendation is purely advisory.

It has been uniformly held that it is not necessary to have a right guaranteed by the Constitution in order to be entitled to procedural due process in the determination of the right. Draft board proceedings have long been upset because they conflicted with the requirements of due process. The Department of Justice stands on no higher plane than the draft boards it was engaged to assist in the investigation of conscientious objector claims. The conclusion reached by the court in *Imboden* v. *United States, supra*, that the procedure should be approved because the right is not constitutionally guaranteed is factitious. It falls by its own weight.

The Sixth Circuit in the *Imboden* case (194 F. 2d 508) missed the mark and made a mistake on the other point. It held that the illegal procedure must be approved because the recommendation was merely advisory. The court overlooked the fact that the recommendation was relied upon in the case. It disregarded the fact that the classification by the appeal board made the Department of Justice proceedings a part of the selective service proceedings.

The decision in the *Imboden* case (194 F. 2d 508) should be rejected, therefore, because it is not in point. Also it should be overruled by this Court because it is inconsistent with the act, the regulations and the requirements of due process of law. The denial of certiorari in the *Imboden* case means nothing helpful here.

The decision in *Elder* v. *United States*, No. 13,405, Ninth Circuit, February 24, 1953, directly conflicts with that of the court below in each of these cases. The decision in the *Elder* case is erroneous for each of the reasons stated here why the position of the Government in these

cases is wrong. The holding of the court in the *Elder* case was made in blindness to former decisions by that court. —See *Chen Hoy Quong* v. *White*, 249 F. 869 (1918).

In the *Chen Hoy Quong* case, *supra*, the court held that an order denying an alien admission to the United States violated due process. The basis for destroying the administrative determination was that confidential evidence was relied upon by the hearing officer that was not disclosed to the alien. This case is directly in point with the facts in these two cases. It directly contradicts and impeaches the holding of the Ninth Circuit in the case of *Elder* v. *United States*, *supra*.

Other decisions by the Ninth Circuit holding that the use of secret evidence by an administrative agency is a violation of due process are *Mita* v. *Bonham*, 25 F. 2d 11, 12; *Ohara* v. *Berkshire*, 76 F. 2d 204, 207.

It is respectfully submitted that the holdings of the court below are in accordance with the intent of Congress. They properly construe the act. The decisions by the Sixth Circuit and the Ninth Circuit to the contrary ought to be rejected. This Court should approve the holdings of the court below in these two cases.

C. If the act is interpreted so as to authorize the procedure of the Department of Justice in refusing to disclose the F.B.I. report to the registrant and the board under Order No. 3229, then the construction will be unreasonable and produce penalties. This is condemned by this Court.

The law announced by this Court requires reasonable interpretation of statutes. A sensible construction of statutes must be adopted to escape oppression and injustice. The Court must presume that Congress intended to avoid unfairness.

A sensible and reasonable construction of "hearing" means a full and fair hearing. It cannot be presumed that

Congress intended to permit oppressive star-chamber proceedings.

If the interpretation placed upon the statute by the Government is accepted, then there is grave doubt as to the constitutionality of the statute. The construction would place upon the act a series of constitutional doubts. This condition of grave doubts as to constitutionality requires the construction here contended for. If it is accepted the constitutional question will be avoided.

Two

The investigations and hearings, using the F.B.I. reports, under Section 6 (j) of the Selective Service Act of 1948, must comply with due process of law, which demands that the investigative reports be shown to the registrants and also placed in their draft board files.

A. It is immaterial that the conscientious objector status is a grant from Congress and not a constitutional right.

Very few subjects within the jurisdiction of different administrative agencies are guaranteed by the Constitution. All are within the reach of the explicit provisions for use of police power by the Government, the commerce clause or the welfare clause. None has been held not to be within the protection of procedural due process because not guaranteed by the Constitution.

Draft board proceedings have repeatedly been declared to be unconstitutional when rights guaranteed by procedural due process have been violated. Why is the Department of Justice above the due-process-clause? Asking this answers that it is not.

The main issue for determination is whether the proceedings violated due process of law and not whether the subject matter is guaranteed by the Constitution.

B. Due process of law condemns star-chamber proceedings by administrative and judicial tribunals.

To try a person in his absence was a favorite practice of the Stuart judges. Reliance upon secret and withheld evidence was a common practice of the Court of Star Chamber. These evils were what the framers of the Constitution intended to shield the people of the United States from.

The procedure of withholding the secret police report prepared by the F.B.I. while using it to deny the conscientious objector claim of a registrant is identical to the practice of the Court of Star Chamber. This procedure is clearly not one of the general rules which govern society. It is not the law of this land. It is alien and should be rejected as contrary to due process of law.

C. Due process requires an opportunity to know the evidence used, even when confidential.

Where facts in secret reports are relied on by an administrative agency, failure to make them available to the parties and make them a part of the record has been held to be a violation of procedural due process.—*United States* ex rel. *St Louis Southwestern Ry. Co.* v. *I. C. C.*, 264 U. S. 64; *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274; *Kwock Jan Fat* v. *White*, 253 U. S. 454.

The holding by the court below in each of these cases is in accord with *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Chen Hoy Quong* v. *White*, 249 F. 869 (9th Cir., 1918); *United States* v. *Uhl*, 266 F. 24, 40 (2d Cir.); *Mita* v. *Bonham*, 25 F. 2d 11, 12 (9th Cir.); and *Ohara* v. *Berkshire*, 76 F. 2d 204, 207 (9th Cir.).

A case directly in point here (the first decision in the country under the draft law to hold that the use of the secret F.B.I. report is a violation of due process) is *United States* v. *Oller*, 107 F. Supp. 54 (D. C. Conn. 1952). That decision ought to be considered and approved here.

These cases are within the principle established by this

Court in the deportation cases.—*Kwock Jan Fat* v. *White*, 253 U. S. 454. See also *Kwong Hai Chew* v. *Colding*, 344 U. S. 590; 596, 597-598, 603. Compare *Shaughnessy* v. *United States* ex rel. *Mezei*, 73 S. Ct. 625.

Norwegian Nitrogen Products Co. v. *United States*, 288 U. S. 294, relied on by the Government, is not in point. There the hearing was legislative. The property rights of the protestant were not directly involved. Administrative remedies following the fixing of the tariff were available and had not been invoked. The case did not involve personal liberty. The cases here involve freedom of the person. This Court has made a distinction between property rights and personal liberty rights.

The case of *Williams* v. *New York*, 337 U. S. 241, on which the Government stands, gives way. It is no support for the contention of petitioner here.

That case involved a pre-sentence investigation report. The defendant had been previously found guilty of murder. There was possible danger to the informants of reprisal.

No duty required the court to follow the evidence in the pre-sentence investigation report. Here it is the responsibility of the Department of Justice and the appeal board to follow the undisputed evidence considered by them upon the consideration of the conscientious objector claim.

The discretion of the judge in the *Williams* case, *supra*, was unreviewable. No complaint could be made about punishment inflicted or findings of guilty so long as it did not exceed the limit fixed by law. Here there is a judicial review of the exercise of the administrative determination. A complaint can be made that if there is no basis in fact for the classification there is no jurisdiction.—*Estep* v. *United States*, 327 U. S. 114. The discharge of the Government employee case (*Bailey* v. *Richardson*, 182 F. 2d 46, 341 U. S. 918), relied on by the Government, is not in point for the same reasons.

The law, according to the greater weight of authority including the holdings by this Court, is that the withhold-

ing of evidence relied upon in administrative proceedings of any kind is a denial of due process. Since there was such a denial here the judgments of the court below should be affirmed.

D. Restrictive judicial review in draft cases (since it is confined to the administrative record) requires that the F.B.I. report be produced at the Department of Justice hearing for examination by the registrant and made a part of the administrative records, and this cannot be cured by even a production of it in court on judicial review.

This Court narrowed judicial review in criminal proceedings under the draft law. The review permitted is not so wide as that allowed in judicial proceedings involving other administrative determinations. There is no trial *de novo* permitted in proceedings brought to review draft board determinations.—See *Estep* v. *United States*, 327 U. S. 114; *Cox* v. *United States*, 332 U. S. 442.

Strict judicial review means strict compliance with all of the procedural requirements of due process.—Compare *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876, 880, 881, (8th Cir.), with Ex parte *Fabiani*, 105 F. Supp. 139, 145-147, (D. C. Penna. E. D.).

E. The fact that records of the Department of Justice are confidential and privileged does not outweigh the requirements of procedural due process guaranteed by the Constitution, since the order of the Attorney General must yield to due process—the privilege is waived in the case.

In many situations where the Department of Justice has relied on Order No. 3229, issued pursuant to 5 U. S. C. 22, the courts have compelled the production of the F.B.I. report. The privilege of secrecy and the claim that the reports are confidential has many times been held waived. It is for the courts, and not for the Department of Justice, to say whether the confidential reports should be produced.

The usual considerations that cause the privilege to override the necessity of producing the F.B.I. report do not exist here. State secrets are not involved. Executive discretion not touching personal rights is not under consideration. There is no danger of reprisals to informers. National security will not be undermined.

Every reason exists, however, why the production of the F.B.I. reports for the use of the registrant and the appeal board should be compelled.

Three

The judgments of the court below in each case should be affirmed for failure by the appeal board to give respondents a lawful classification and because the report of the hearing officer and the recommendation of the Department of Justice violate the regulations, the act and due process of law.

A. Nugent was deprived of his rights on appeal by the hearing officer's making an arbitrary and capricious report against Nugent; in his failing to give Nugent a chance to offer material evidence on important matters and in his secretary's telling Nugent prior to the hearing that he need not bring witnesses to the hearing.

B. Packer was deprived of his rights on appeal by the arbitrary and capricious holding of the hearing officer.

C. The denial by the appeal board of the conscientious objector status to Nugent and Packer was arbitrary, capricious and without basis in fact.

Four

Reversible error requiring a new trial was committed by the trial court in the Packer case by quashing the subpoena duces tecum issued to compel the production of the F.B.I. report of the trial.

Argument

One

A reasonable construction of Section 6 (j) of the Selective Service Act of 1948 requires access by the registrants to the investigative reports made by the Federal Bureau of Investigation.

A study of legislative history of the 1940 and 1948 acts shows a fair and just treatment intended for conscientious objectors. It shows that the term "appropriate inquiry and hearing" was used. A "fair hearing" was implied by the term "hearing". There is nothing explicit or implicit in the acts or the history of them that authorizes the procedure of withholding the F.B.I. report. The use of the word "hearing" implies a full and fair hearing. This commands production of the F.B.I. report.

The problem and need of a new selective service law was precipitated when the president on March 17, 1948, in his message to Congress demanded it.—See Senate Report No. 1268, dated May 12, 1948, to accompany Senate Bill 2655, at pages 1-2.

Hearings were had but no reference was made to the procedure for investigation of the conscientious objector claims or the use of the F.B.I. report. Complaints were made at the hearings about the determinations being made by General Hershey and other military personnel. Due to the objections by various religious organizations and peace groups, the bills that were introduced provided for the final determination of all claims on appeal to be made by a civilian national appeal board and not by General Hershey. This change is not important or relevant to the question considered here.

Following the Senate Report No. 1268, dated May 12, 1948, to accompany Senate Bill 2655 there was a conference report in the House of Representatives dated June 12, 1948, being Report Number 2438. This report adopted the House

provisions for the complete exemption of conscientious objectors from work and rejected the Senate provision for work by these objectors similar to that contained in the act of 1940. (See the report, on page 48.) Otherwise the report containing the bill that was ultimately to become the Selective Service Act of 1948 contained the same provisions for conscientious objectors as did the 1940 act.

When the bill (Senate Bill Number 2655) was debated in the Senate, a proposal was made to amend the act and provide for a special civilian commission outside the Selective Service System supplemented by inquiry and hearing by the Department of Justice. (94 Cong. Rec. 7277-7279, 7303-7304.) This proposed change in the act was due to statements appearing in the report of the Attorney General for 1944. References were made to his report and excerpts were copied into the Congressional Record. (See 94 Cong. Rec. 7278-7279, 7303-7304.) In conclusion Attorney General Biddle said: "The Congress may well consider the desirability of meeting these complexities by establishing a board to deal especially with conscientious objectors, having final discretion with respect to their proper individual classifications as well as their prompt assignment to suitable and useful work."—94 Cong. Rec. 7279.

Senator Morse during the discussion said: "We should see to it that the procedures which we adopt for the handling of conscientious objectors also square with the constitutional guarantee which is theirs. . . . [¶] But the fact that we cannot understand and do not understand and fully appreciate the religious faith and the spiritual beliefs of the conscientious objectors I think should make us overcautious and cause us to lean over backwards to make certain we deal with exceeding fairness with the conscientious objector. We should make very sure that we give to him all the protections to which he is entitled under the Constitution."—94 Cong. Rec. 7303, 7304.

Senator Morse also said during the discussion that "we cannot have religious freedom under the Constitution of the

United States and then in practice deny it, even by way of limiting religious freedom by the procedure which we adopt and impose upon those who seek to exercise their full religious freedom under the Constitution". (94 Cong. Rec. 7277) And he quoted from the Report of the Attorney General for 1944, as follows: "'In any further consideration of the selective-service legislation, or any future adoption of peacetime military training, it will be necessary to weigh the administrative, psychological, and ethical problems of conscientious objection which have not yet been fully solved.'" —94 Cong. Rec. 7279.

Concerning the proposed amendment that would take classification of the conscientious objector from the Selective Service System and place it with the special commission, Senator Gurney said: "Heretofore, the Department of Justice has investigated appeals which the objectors make from the local boards . . . What we are after really are the facts, and the Department of Justice has always shown itself perfectly capable of uncovering the facts. . . . The local selective service board, which classifies these men, would have no way in which to ascertain whether or not they were simply attempting to evade service, rather than having a bona fide conscientious objection. Therefore, striking that part of the section having to do with investigation by the Department of Justice would preclude the thorough investigation needed in these cases." (94 Cong. Rec. 7305-7306.) The proposed amendment suggested by Senator Morse was rejected.—See 94 Cong. Rec. 7307.

It can be seen, therefore, that when House Resolution 671, providing for a consideration of H. R. 6401, was finally considered, there was no specific discussion whatever as to the propriety of the investigative procedure pursued by the F.B.I. and the policy to withhold the secret investigative report from the registrant by the hearing officer and the Department of Justice.—See 94 Cong. Rec. 8419-8431.

A reading of the discussions and the reports on the bills that became the 1940 act and the 1948 act fails to reveal any

discussion on the use of the F.B.I. report. The subject of the investigation of, and hearing on, the conscientious objector claim was first discussed under the 1940 act. This investigative procedure was not provided for in the 1863 act or the act of 1917. Never was the use of the secret F.B.I. reports discussed under the 1940 act or 1948 act.

The general rules of due process have not been limited by the Congress. Due process required by the Fifth Amendment was in the minds of Congress when Congress provided in Section 13 (b) of the Selective Service Act of 1948 (50 U. S. C. App. 463) as follows:

"All functions performed under this title shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 of such Act."

Section 3 of the Administrative Procedure Act (U. S. C. 5, § 1002) reads:

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating to the internal management of an agency- . . . (c) *Public Records.*—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

These two strong provisions clearly show that Congress did not intend to narrow the constitutional requirements of procedural due process. Congress recognized the requirements of the Fifth Amendment making it necessary to have the records available when it enacted these provisions.

It seems that Section 13 (b) of the Selective Service Act of 1948 and of the Universal Military Training and Service Act provides for disclosure. The very fact that Congress in the act provided for an appropriate investigation and hearing constitutes a specific overruling of the Department of Justice policy regardless of whether this policy was in the view of Congress.

To understand the legislative history of the 1948 act the background of the 1940 act must be considered. The 1948 act being identical to the 1940 act in most respects, it is necessary to consider the history of the 1940 act along with the 1948 act. Senate Report No. 1268, 80th Congress, Second Session, dated May 12, 1948, accompanying Senate Bill 2655, indeed, under Section VI, discussing Section 6 (j) of the act, said concerning conscientious objection: "This section reenacts substantially the same provisions as were found in subsection 5 (g) of the 1940 act." Because of this references should first be made to the reports on the 1940 act, before taking up the 1948 act.

June 20, 1940, Senator Burke of Nebraska introduced Senate Bill No. 4164 in the 76th Congress, Third Session. On the next day Representative Wadsworth of New York introduced his bill in the House of Representatives, being H. R. 10132. The bills were referred to the Senate and House Committees on Military Affairs. During July and August of 1940 extensive hearings were held. Inasmuch as the bills contained provisions for the conscientious objectors similar to that contained in the 1917 act, objections were raised. The consequence was that the committee submitted a new plan for treatment of the conscientious objector. Amendments were offered. The House and Senate could not agree on the terms of the amendments. On August 5, 1940, the Senate in the 76th Congress, Third Session, reported on Senate Bill 4164 and provided in Section 5 (d) for a preliminary investigation and recommendation by the Department of Justice directly to the local board.

When the Burke-Wadsworth Bill was being discussed,

Mr. Walter of Pennsylvania introduced an amendment in the House to eliminate the original investigation and determination of the conscientious objector claims by the Department of Justice instead of the local board. The amendment was to place the responsibility first in the hands of the local board. The amendment carried.—See 86 Cong. Rec. 11689.

The Burke-Wadsworth Bill then went to a conference to harmonize the differences between Senate and House. The "Statement of the managers on the part of the House" in making their conference report on September 12, 1940, shows there was an original plan to refer the conscientious objector cases by the local board to the Department of Justice. The House amendment was accepted by the joint conference and an agreement reached that the conscientious objector classification would be first determined by the local board with the right of appeal. Among other things, the conference report reads: "Upon the filing of such appeal, the appeal board is directed forthwith to refer the matter to the Department of Justice for an inquiry and hearing. After appropriate inquiry by the proper agency of the Department of Justice, a hearing is to be held by the department with respect to the character and good faith of the objections."—86 Cong. Rec. 12038, 76th Congress, Third Session.

The same conference report made to the House was also made to the Senate on the next day.—See Hearings on Senate Bill 4164, 86 Cong. Rec. 12082, 76th Congress, Third Session.

The effect of this compromise was not to fix the type of hearing. It was solely to settle whether the conscientious objector classification was to be determined by the local board after a Department of Justice investigation or before the investigation.

House Report No. 2947 to accompany Senate Bill 4164 dated September 14, 1940, states, under "Conscientious Objectors", "After appropriate inquiry by the appropriate

agency of the Department of Justice, a hearing was held by the Department of Justice in the case of each such person with respect to the character and good faith of his objections."—See pages 17-18, House Report No. 2947, 76th Congress, Third Session, September 14, 1940.

Senate Report No. 2002, on Senate Bill 4164, dated August 5, 1940, provided as follows: "The measure is *fair* both to a person holding conscientious scruples against war and to the Nation of which he is a part. It provides for inquiry and hearing by the Department of Justice to make recommendations as to whether a person claiming deferment because of conscientious objection to war is or is not a bona fide conscientious objector. . . . The rights of a conscientious objector and of the Government are fully protected against possible local prejudice, influence, or passion, by provision for appeal to a board of appeal." —Senate Report No. 2002, 76th Congress, Third Session, p. 9. (Emphasis added)

The Senate placed emphasis upon the word "fair". The act would not be fair to a registrant if he were permitted to be deprived of his liberty by evidence received secretly by the administrative agency. He would be unjustly dealt with if the administrative agency made a determination based upon evidence kept from him. Congress intended that the word "fair" have the broadest possible meaning when applied to administrative procedure intended to be used in the selection of registrants for service. The connotation placed upon the word "fair" by courts of justice would necessarily conclude that Congress intended to condemn secret investigations and classification of registrants made without notice and knowledge of all the evidence relied upon by the administrative agency.

Had Congress intended to place upon the word "fair" a narrow and restrictive meaning, certainly it could have and would have limited the meaning of the term. It could have provided for the secret hearing and the determination made without knowledge of the facts by the registrant.

Failure of Congress to so provide spells out a clear intent of Congress to require all the evidence, including the secret F.B.I. reports, to be included in the draft board files.

After the denial of the conscientious objector classification by the local board and a preliminary denial of such claim by the appeal board, the registrant is entitled, as a matter of right, and the Government is required to grant, an investigation and hearing by the Department of Justice. *Conscientious Objection,* Special Monograph No. 11, Vol. I, page 89, Selective Service System, Washington, Government Printing Office, 1950, states: "The System's board of appeal then referred the case to the Department of Justice for inquiry and hearing, which agency after taking such action made recommendation to the appeal board on the type of service. Neither the World War I nor Civil War enactments contained such special instruction."

The procedure followed by the Department of Justice under the 1940 act is described by Joseph C. Duggan, formerly of the Department of Justice. He handled a large amount of the processing of conscientious objector cases in the department up until June 1945. He is quoted by General Hershey thus: "The investigation in this type of case is an inquiry into the character of the registrant, and is undertaken to determine whether he has the religious training and belief required by the statute, whether he is sincere, and whether his daily conduct is consistent with his professed claim for exemption as a conscientious objector.

"Upon completion of such inquiry, the registrant's file and the investigative report are then transmitted to a Special Assistant to the Attorney General designated as hearing officer under section 5 (g) of the Selective Service Act.

"The hearing officer thereupon issues a 'notice of hearing' to the registrant and furnishes him with a copy of the instructions governing the conduct of the hearing. The notice of hearing allows the registrant 10 days in which to

appear, and informs him that he may bring any witnesses or documentary evidence to the hearing in order to substantiate his claim. . . . While no exact counterpart of the hearing officer is known to the System, he is a quasi-judicial officer who acts in a capacity analogous to that of a trial examiner."—Selective Service System, *Conscientious Objection*, Special Monograph No. 11, Volume I, page 126, Washington, Government Printing Office, 1950.

General Lewis B. Hershey, in this same publication entitled "Conscientious Objection", *supra*, said: "It was well known that these cases were carefully investigated by the Federal Bureau of Investigation, although the report of the investigation of that Bureau was not contained in the information forwarded to the board of appeal. In a large number of cases, however, the Hearing Officer's report, which was forwarded to the board of appeal and was placed in the registrant's Cover Sheet (thereby being made available to the registrant himself) contained references to the investigation by the Federal Bureau of Investigation. . . .

"The Department of Justice and Selective Service took the position that each time the case of a registrant who claimed to be a conscientious objector came before a board of appeal, the case must be referred to the Department of Justice for its recommendation. This was felt to be the direct application of the law. In addition such reference was necessary because *new factors* in the case might be brought to light by the Department's investigation and hearing. . . . [Emphasis added]

" . . . The Department even went further by having the Federal Bureau of Investigation make a special investigation of the registrant and a Hearing Officer conduct hearings for him to provide exhaustive material on conduct, training, and belief. These data were basic also when the State Director or the Director of Selective Service was considering an appeal to the President and when the Presidential Appeal Board was engaged in classifying."—Selective Service System, *Conscientious Objection*, Special

Monograph No. 11, Volume I, pp. 147, 150, 155, Washington Government Printing Office, 1950.

The very fact that "new factors", emphasized above, might be "brought to light" by the investigation and hearing meant that the "light" would be available for the use of the registrant and the appeal board as well as the Department of Justice. Certainly Congress did not intend that "new factors" would be within the knowledge of the Department of Justice and withheld from the registrant. Surely Congress did not intend that the Department of Justice have the only "light". The registrant was entitled to have the "light" discovered by the Federal Bureau of Investigation. The appeal board (the agency that finally determined the matter) is especially entitled to the "light" found by the Department of Justice through the F.B.I. report.

The withholding of the report from the registrant and the appeal board keeps the "light" away from the very ones who need it. The registrant is vitally concerned over his classification; the ultimate and final responsibility for classification is placed on the appeal board. That agency is also vitally interested in getting the "light".

It is contrary to the intention of Congress that the Department of Justice withhold the "light" from the appeal board. Surely Congress did not intend that the registrant and the appeal board be kept in darkness while the Department of Justice bask in the "light".

The Director of Selective Service also states that the purpose of the investigation and hearing is to provide "exhaustive material". If this material is to be "exhaustive" for the use of the appeal board, it must be intended by the law that the complete F.B.I. report be made available to the appeal board. The exhaustive material is kept in the secret files of the Federal Bureau of Investigation of the Department of Justice. The Department of Justice, therefore, does not provide the administrative agency, charged with

the responsibility of classification, with the needed "exhaustive material on conduct, training and belief".

It seems, therefore, that the fair and reasonable interpretation of the act and regulations clearly indicates that the complete F.B.I. report must be made available to the registrant and included in the draft board file when it is returned to the appeal board.

Joseph C. Duggan, former Assistant to the Attorney General, in charge of the processing of conscientious objector cases, in his own book (published before the above monograph) entitled "The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service", Washington, Catholic University of America Press, 1946, says (pp. 113-115), among other things:

"If the Board of Appeal should classify the registrant in a deferred class, or exempt him as a conscientious objector in accordance with the nature of his claim therefor, it shall record its decision and return the file, generally through the office of the State Director, to the Local Board of origin. (Section 627.25) . . .

"Reference to the Department of Justice pursuant to Section 5 (g) of the Act and Section 627.25 (a) (4) of the Regulations is effected by transmitting the file to the United States Attorney for the federal judicial district in which the Board of Appeal is located. The United States Attorney thereupon examines the file to determine whether the Department of Justice has jurisdiction and, if he so determines, the file is transmitted to the nearest Field Office of the Federal Bureau of Investigation for appropriate investigation. ([Footnote:] The procedure for handling cases referred to the Department of Justice is outlined in Departmental Circular No. 3461, as amended, dated February 11, 1941. Through June, 1945, approximately 12,000 cases had been so referred. Administration of the conscientious objector provisions of the Selective Service Act is supervised by a division in the Department separate

and distinct from that charged with enforcement of the penal sanctions of the Act.) The investigation in this type of case is an inquiry into the character of the registrant, and is undertaken to determine whether he has the religious training and belief required by the statute, whether he is sincere, and whether his daily conduct is consistent with his professed claim for exemption as a conscientious objector.

"Upon completion of such inquiry, the registrant's file and the investigative report are then transmitted to a Special Assistant to the Attorney General designated as Hearing Officer under Section 5 (g) of the Selective Service Act.

"[Footnote 112 on page 114 states:] (This report is confidential in character and enjoys immunity from disclosure of its contents like all other executive documents. (See Ex parte *Sackett*, 74 F. 2d (C. C. A. 9) 922 and 40 Op. A. G. No. 8 (1941).) In the interests of fairness, however, the claimant—conscientious objector is given an opportunity to rebut or explain any evidence which tends to defeat his claim. Paragraph 4, Revised Instructions to Registrants, Supp. No. 4, Department of Justice Circular No. 3461, dated Oct. 12, 1942.)

"The Hearing Officer thereupon issues a 'Notice of Hearing' to the registrant and furnishes him with a copy of the instructions governing the conduct of the hearing. The Notice of Hearing allows the registrant ten days in which to appear, and informs him that he may bring any witnesses or documentary evidence to the hearing in order to substantiate his claim. The Hearing Officer has no power of subpoena and the appearance of the registrant is entirely voluntary. While no exact counterpart of the Hearing Officer is known to the system, he is a quasi-judicial officer who acts in a capacity analogous to that of a trial examiner.

"The sole question before the Hearing Officer is whether or not the registrant is entitled to be classified in accordance with his claim for exemption. He has no advisory jurisdiction over any other Selective Service classification but he

can sustain, partially sustain or deny the claim for conscientious objector classification.

"The hearing accorded the registrant before the Hearing Officer is informal and nonlegalistic, and in no sense is the registrant deemed to be on trial. By observation and examination at the hearing, the Hearing Officer attempts to prove the conscience of the registrant and to determine, on the basis of the record, the investigation and the hearing, whether he is a sincere, religious objector.

"After concluding the hearing, the Hearing Officer prepares a report in triplicate in which he makes a recommendation to the Department of Justice. ([Footnote:] Contrary to the intimations of the Second Circuit Court of Appeals in *U. S.* v. *Kauten,* 133 F. 2d 703 (1943), *U. S.* ex rel. *Reel* v. *Badt,* 141 F. 2d 845 (1944) and *U. S.* ex rel. *Phillips* v. *Downer,* 135 F. 2d 521 (1943), recommendations are made to the Boards of Appeal *by the Department of Justice and not the Hearing Officer.* This is in strict conformity to the statute.) This report containing findings and conclusions of law, together with his recommendation relative to the registrant's classification, is transmitted to the Office of the Assistant to the Attorney General in the Department at Washington for examination and review.

"It is possible that the report may be returned to the Hearing Officer with a memorandum of disagreement from the Department. If, however, the Department concurs in the findings of the Hearing Officer, it proceeds to make a recommendation to the Board of Appeal from which the case originated. This recommendation is generally made by adopting, approving, and concurring in the advisory recommendation of the Hearing Officer to the Department. ([Footnote:] The Department, however, may overrule the Hearing Officer, and make a recommendation different from his. In such instances, the Hearing Officer's report is submitted to the Board of Appeal for purposes of information.) Upon return of the file, together with a recommendation to the Board of Appeal, the administrative function of the

Department in conscientious objector cases is complete.

"The subsequent proceedings by the Board of Appeal consists of consideration of the recommendation made by the Department of Justice. The Board of Appeal is not bound by the recommendation of the Department but it is required only to give consideration thereto, and thereupon it proceeds to classify the registrant and transmit its decision to the registrant's Local Board. ([Footnote:] S. S. R. Sec. 627.25 (c). The persuasive weight of the recommendation of the Department of Justice is disclosed by the fact that out of 2,699 recommendations made between July 1, 1943, and June 30, 1944, the Boards of Appeal failed to concur with the Department in only 132 cases. REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR ENDED JUNE 30, 1944, 13.)"—Duggan, *The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service*, pp. 113-115, Washington, Catholic University of America Press, 1946.

It is noticed that Mr. Duggan says that the registrant is given an opportunity to refute and explain in "the interest of fairness". The word "fairness" includes a fair hearing. A fair hearing means that all of the evidence used by the hearing officer must be produced and made a part of the draft board file. The word also carries with it the responsibility of supplying the registrant with the adverse evidence. The duty does not end with providing a registrant with adverse evidence, however. The registrant and the appeal board are both entitled to have the benefit of even all the favorable evidence.

Repeatedly, throughout the Government's brief, the statement is made that it "is clear that Congress" never contemplated a disclosure of the F.B.I. report. It several times says that Congress meant to deprive the Selective Service System of "sources of information necessary for making" the recommendation. It is difficult to understand why it is so clear to the Government. After citing all of the statutory

history on the 1917 act, the 1940 act and the 1948 act, it admits that there is nothing on the subject. It says that Congress never considered or discussed this point. The Government is blowing hot and cold. First it says Congress did not; next it says Congress did. Which is it? Yet it has the temerity to say that Congress intended that the F.B.I. report be kept from the registrant. Why it could be said to be "clear" when Congress said nothing about the procedure is difficult to understand. Perhaps the Government has entered into the field of metaphysics or the occult science and is now using supernatural powers.

Mr. Duggan, in the above report, also says that the report of the hearing officer is transmitted to the appeal board "for purposes of information". How can the appeal board have information needed by it if the F.B.I. report is withheld? When it receives only the report of the hearing officer, that is not sufficient. It is only part of the Department of Justice record.

This need of the appeal board is very eloquently stated by Mr. Wallace W. Brown, Chairman of the Appeal Board for the State of Connecticut. His repeated letters to the Attorney General requesting the complete F.B.I. report appear in the record in *United States* v. *Pekarski*, No. 221, October Term, 1952, United States Court of Appeals for the Second Circuit. (See Appendix A below, pp. 184-196.) The Department of Justice refused to produce the secret F.B.I. report requested by the chairman of the appeal board in the *Pekarski* case. Because of such failure the appeal board ultimately denied the full conscientious objector claim made by Pekarski. A copy of the record in the *Pekarski* case is filed with the clerk of this Court as an exhibit to this brief. —See pages 83-86, 92-96, 100-105.

The Government has not been satisfied with this grievous injury to the rights of the registrant. It has recently, by Executive Order No. 10363, June 17, 1952, gone a step further and added insult to injury by now completely with-

holding from the appeal board and the registrant the report of the hearing officer.—See Section 1626.25 of the Selective Service Regulations, as amended.

The question may be asked, How did the procedure of neither making the secret police investigative report a part of the file nor showing it to the registrant originate? It came about in this way. The 1940 act was silent on the type of hearing that was to be conducted. The Department of Justice had its Order No. 3229 made by the Attorney General pursuant to R. S. 161. The statute (5 U. S. C. 22) and the order make confidential and privileged against general inspection the records of the Department. This was by the Attorney General extended to the secret investigative reports of the F.B.I. of the conscientious objector cases. 40 Op. A. G. No. 8 (1941). The Department of Justice, naturally, observed the order and the opinion of the Attorney General.

The Department of Justice recognized that due process of law required some kind of notice to the registrant of the adverse evidence appearing in the F.B.I. secret report. Accordingly, in conformity with what the department considered to be the minimum, the procedure for handling cases referred to the Department of Justice was outlined in Departmental Circular No. 3461, as amended, dated February 11, 1941.

That required a written notice to be mailed to the registrant by the hearing officer following the investigation and F.B.I. report to appear before him for a hearing. Accompanying this notice was a set of written instructions stating that the registrant could, upon request to the hearing officer, be informed "as to the general nature and character of any evidence . . . which is unfavorable to, and tends to defeat, the claim of the registrant. Such request being granted to enable the registrant more fully to appear, to answer and refute at the hearing such unfavorable evidence".

This right to demand a statement of the unfavorable

evidence before appearing was short-lived. It was stopped in October of 1942. In *Conscription of Conscience*, Ithaca, Cornell University Press, 1952, Sibley and Jacob state: "Prior to October 10, 1942, he could ask for such a statement before his hearing. After that date, the request had to be made at the hearing. This change was criticized by many advisers of conscientious objectors on the ground that it left the applicant in the dark until the time of the hearing. On the other hand, the Department of Justice claimed that clerical help was not available to make the earlier procedure practicable; that under the new rule, the Hearing Officer could (to afford the applicant time to rebut contentions in the F.B.I. file) postpone the hearing until a later date or invite the applicant to submit written material; and that in 80 per cent of the cases before Hearing Officers, objectors did not utilize their right to ask for unfavorable testimony in F.B.I. reports."—Page 73.

The Government argues that the only thing that the conscientious objector claimant does not get is the identity of the witnesses whose information appears in the F.B.I. report. This is whitewashing the fact that the F.B.I. investigation report is not given to the registrant. The law demands this; until it is supplied, there is much more than nondisclosure of the identity. There is an absolute denial of an opportunity to reply to the unfavorable F.B.I. report.

In Section 6 (j) of the act Congress provided for a full opportunity to establish the sincerity of the claim. This was through the requirement of appropriate inquiry and hearing. The device put forth by the Department of Justice as a substitute for this requirement defeats the very purpose of Congress. The Department of Justice comes forth with a mere shell. The notice that is mentioned as being given to the registrant is never available to him unless he requests it.

He does not get the notice before the hearing. He learns about the adverse evidence only at the hearing. Even then he cannot be sure that he gets all of the adverse evidence.

He does not have the names of the witnesses. He does not have the exact nature of the statements made.

At most the hearing officer gives him only general and illusive statements. This is a mere makeshift. It does not satisfy the requirements of the "hearing" provided by Congress. He finds himself blindly engaged in a struggle with the Department of Justice. This is not a hearing contemplated by Congress.

The change of procedure whereby the registrant was no longer permitted to obtain the substance of the adverse evidence appearing in the F.B.I. report before the hearing but was forced to wait until he appeared at the hearing seems to be covered by paragraph 4, Supplement No. 4, Department of Justice Circular No. 3461, dated October 12, 1942.

In these cases the instructions were sent to each registrant so that he could request the adverse evidence. The law says he is entitled to a full and fair hearing. The Department of Justice admits this. If each respondent was entitled to a full and fair hearing, is this not a concession by the Department of Justice that a "fair" hearing was required? It is only after a "fair" hearing that there is jurisdiction to report on the conscientious objector claim. A report based on an unfair hearing is certainly in violation of the act and regulations.

The Government admits that the notice of unfavorable evidence in the F.B.I. investigative report in each of these cases is not typical. But it refers to the report of the hearing officer made in *Imboden* v. *United States*, 194 F. 2nd 508, 510 (6th Cir.). Respondents deny that the report of the hearing officer to the Department of Justice in the *Imboden* case is typical of the notice given. The summary of the F.B.I. investigation appearing in the hearing officer's report is not the notice that is given to the registrant. The reports in the *Nugent* and *Packer* cases would

have enlightened the Court more than that made in the *Imboden* case.

This Court ought not to be misled by the summary of the F.B.I. investigation appearing in the report of the hearing officer. The summary appearing in the report is not seen by the registrant until after the appeal board determination, when the file is sent back to the local board.

What is given to the registrant is not in advance of the hearing by the hearing officer. It is oral notice of the general nature of the evidence. It is not a specific summary such as appears in the quotations from the opinion in the *Imboden* case made by the Government in footnote 18, page 59 of its brief. It seems that the Government has thrown this quotation into its brief for the purpose of having the Court infer this is the type of summary given to the respondents in these cases. Nowhere is there any Government proof that such a summary was offered to the respondents. The testimony of each respondent was that there was no such summary given as appears in footnote 18 of the Government's brief.

It should be remembered that in the *Nugent* case Hearing Officer Gallagher did not follow the instructions that he mailed to Nugent. While his secretary misled Nugent, he concealed the unfavorable evidence he had and which he relied upon.

The Government makes a big point about its furtive procedure being known to conscientious objectors and conscientious objector organizations. Now just what benefit to the Court is this? Suppose that they were aware of it? Does knowledge of violations of law legalize the invalid procedure? Since when does law violation become legal merely because it is known even to the public or to a minority group? Knowledge or even consent on the part of thousands —yes, even hundreds of thousands—of conscientious objectors means nothing.

The fact that this question has not been raised in the many cases that were prosecuted under the 1940 act also means nothing. In the thousands of prosecutions under the 1940 act no defense of any sort was permitted. The whole problem was to establish the right to make any kind of defense. The barrier set up by the Department of Justice and the courts was finally overcome in the case of *Estep* v. *United States*, 327 U. S. 114. Then the war was over. No further prosecutions were conducted. It was impossible to raise this point at all in any of the prosecutions under the 1940 act. Assuming that this point could have been raised, the fact, however, that it may not have been urged when it could have been means nothing. That only twenty per cent of the registrants requested to be notified of the adverse evidence proves nothing. The law and the intention of Congress are not to be determined by the practice of innumerable registrants. It should be kept in mind that registrants come from the general cross section of the population. They are not lawyers. They cannot be presumed to have a knowledge of their rights. Congressional intent is to be imputed only from the language. No solace to the Government on its contention can be gained from the fact that only twenty per cent of the registrants requested the hearing officers to tell them of the unfavorable evidence.

It is the responsibility of the Department of Justice to make the F.B.I. report available to the registrant regardless of whether it was requested by him. If Congress intended that all of the evidence should be made available to the administrative agency, the fact that the registrant did not request the hearing officer to supply the evidence is wholly irrelevant and immaterial. Fairness required the evidence to be produced. The fairness of the administrative agency does not hang on whether the registrant requested the adverse evidence or the F.B.I. report to be produced. The Government's contention that it is necessary for the registrant to request the adverse evidence or the F.B.I. report

makes the procedure on a conscientious objector hearing a game of chance.

The Government takes the position that the procedure outlined by the regulations of Department of Justice Circular 3461, as amended February 11, 1941, is "clearly adequate". It says that the department supplies the registrant with a summary of the evidence and the adverse contents against him.

While the giving of this inadequate notice, or the failure to give a full summary of the police report, is entirely immaterial to the question of whether it is the duty of the Department of Justice to produce the full F.B.I. report to the registrant at the hearing, the fact remains that the notice actually given was inadequate according to procedural due process, even though the law does not require the production of the report or a copy of it.

The Government argument that the above described departmental procedure of furnishing notice of the adverse evidence is adequate overlooks much. How can a registrant be sure that he is given *all* of the adverse evidence? How can the Court depend upon hearing officers' giving adequate notice in every case? Since when must secondary notice be taken as a substitute for the best evidence? It is perfectly all right for the administrative official to make a report of oral evidence given by a witness at a hearing. No objection can conceivably be raised to this. If the report is inadequate, the registrant who was present and heard the oral evidence could correct it. He could protect himself from an inadequate record.

But here the registrant does not know what the evidence is. How can he combat an inadequate notice? How is he able to protect himself against omissions of the hearing officer? When the primary evidence is in writing and is available, how, in the name of truth and justice, can anyone say that it is adequate when none of it is given?

It is a fundamental rule of evidence that documentary

evidence, which is the best evidence, must be used. Secondary evidence, such as an oral description of the document or a secondary summary, may not be used. Secondary evidence may be used only when the best evidence is not available. In this case the best evidence was available. The Government refused to produce the F.B.I. report which was at hand.

It seems obvious that the Congress that passed the 1940 act, as well as the 1948 act, intended that selection of registrants must be made by fair and just standards. Senate Report No. 1268, 80th Congress, Second Session, dated May 12, 1948, accompanying Senate Bill 2655, stated: "This subsection enunciates the principle that the obligations and privileges of serving in the armed forces should be shared generally, and in accordance with a just system of selection." (§ VI (c)) The act itself so provides.—See § 1 (c).

This provision is almost identical to the provision appearing in the Selective Training and Service Act of 1940. "The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service."—Sec. 1 (b), 54 Stat. 885.

A fair and just selection of registrants cannot be accomplished without a full and fair hearing. The act and regulations contemplated that the hearing before the hearing officer of the Department of Justice was to be a full and fair hearing. Had the local board used outside written evidence and refused to disclose it to the registrant, this would have been a violation of the regulations. (32 C. F. R. §§ 1623.1, 1626.24) If the local board must accord the registrant notice of adverse evidence so that he can refute it or make it available to him by reducing it to writing and putting it in the file, it seems only just and proper that the secret investigative police report of the F.B.I. used by the hearing officer and the Department of Justice should be

included in the file and made available to the registrant at the hearing. Without doing this, there is not a full and fair hearing contemplated by the act.

The president, in promulgating the Selective Service Regulations, provided that there must be a full and fair hearing before the system. If there is the executive policy to require a local board to notify a registrant of all adverse evidence, then fairness should clearly mean that the executive policy requires similar conduct on the part of the Department of Justice. The Selective Service Regulations constitute an executive interpretation of the act. This interpretation requires that all evidence considered by the system be reduced to writing and placed in the registrant's file. There is nothing in the executive interpretation of the act that in any way justifies the policy of the Department of Justice in withholding the F.B.I. report from the registrant and appeal board.

In addition to providing for appropriate investigation, a hearing and a notice of the hearing to the registrant, the Selective Service Regulations, Section 1626.25 (c), provide the registrant with an opportunity to be heard. This means an opportunity to be heard on all the evidence. He is not to be heard only on one side of the case. "Hearing" means that he has the right to answer the other side. Section 1621.8 of Selective Service Regulations provides that all papers pertaining to the registrant shall be placed in his selective service file. Since Section 6 (j) of the act provides that the investigation shall be into the character and good faith of the conscientious objections of the registrant, then the investigation pertains to the registrant and to nobody else. Keeping the investigation report out of the file is, therefore, a violation of this regulation.

Section 1 (c) of the 1948 act has provided high standards for the selection and drafting of registrants. If the selection is to be fair and just, then all evidence used in the case including evidence obtained in the F.B.I. report must be

disclosed to the registrant. There can never be a fair and just determination when the evidence is concealed.

The Government argues that since Congress was not constitutionally required to provide for any particular kind of appeal procedure, the practice of the Department of Justice should be approved by the Court. Congress did provide for an appeal procedure. It used the word "hearing". This word was not limited in its definition. The hearing was to determine the right granted by the act. The right given was the conscientious objector status. The very fact that a hearing was provided for means a full and fair hearing was intended. This requirement cannot be side-stepped on the specious argument that Congress was not constitutionally required to provide for any sort of hearing. Congress did provide. That is sufficient.

The Government says that Congress is free to provide a type of procedure considered appropriate. This assumes that Congress established the procedure in question. Congress did not establish this particular procedure. It was evolved by the Department of Justice. It was not envisioned by Congress.

It would be impossible to get all of the facts merely by a one-sided investigation. The interpretation by the Government of the act is not a fair one. When the Senate Armed Services Committee brought in its final report under the proceedings for the adoption of the 1940 act it said that the appeal procedure was fair to both sides—not one side—in providing for an investigation and a hearing. Certainly it cannot be fair to the registrant as well as the Selective Service System if only one side can get all of the evidence and the conscientious objector claimant is given only such evidence as the Department of Justice is willing to disclose.

It should be remembered that even Congress does not, in its own ordinary hearings, receive evidence in camera. In hearings it does not receive one-sided evidence. It always hears both sides. The hearings are open. All sides are per-

mitted to hear all testimony. Why and how can it be assumed that Congress intended to approve police-state practices of concealing the evidence?

Conscientious objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states throughout American history. It finally became part of the national fabric during the Civil War and has grown in breadth and meaning ever since. (See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, pp. 29-66, Washington, Government Printing Office, 1950.) So strongly was the principle of conscientious objection imbedded in American principles that President Lincoln and his Secretary of War thought that conscientious objectors had to be recognized. This is impressed upon us by Special Monograph No. 11, Vol. 1, *supra,* at page 43: "At the end of hostilities Secretary of War Stanton said that President Lincoln and he had 'felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven.'"

The petitioner in its brief begins the history of the governmental treatment of conscientious objectors in American history with the 1917 act.

As appears above, the Selective Service System in Special Monograph No. 11, Vol. I, carries the history far back, even before the American Revolution. (*Ibid.,* pages 29-35) Virginia and Maryland exempted the Quakers from service. (*Ibid.,* page 37) From the Revolution to the Civil War provision for exemption of conscientious objectors appears in the state constitutions. During the Civil War the military provost marshal was authorized to grant special benefits to noncombatants under Section 17 of the act, approved February 24, 1864. Lincoln was urged to force conscientious objectors into the army. He replied:

"No, I will not do that. These people do not believe in war. People who do not believe in war make poor soldiers.

. . . These people are largely a rural people, sturdy and honest. They are excellent farmers. The country needs good farmers fully as much as it needs good soldiers. We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun."—*Ibid.*, pages 42-43.

Congress certainly must have had in mind the historic national policy of fair treatment to conscientious objectors. The well-known governmental sympathy toward the Quakers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by this Court in *Girouard* v. *United States*, 328 U. S. 61. In that case, this Court, speaking through Mr. Justice Douglas, said that "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion granted by the First Amendment is the product of the struggle. As we recently stated in *United States* v. *Ballard*, 322 U. S. 78, 86, 'Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624.' . . . Over the years Congress has meticulously respected the tradition and even in time of war has sought to accommodate the military requirements to the religious scruples of the individual. We do not believe that Congress intended to reverse that policy when it came to draft the naturalization oath. Such an abrupt and radical departure from our traditions should not be implied. (See *Schneiderman* v. *United States*, 320 U. S. 118, 132.) Cogent evidence would be necessary to convince us that Congress took that course."—328 U. S. 61, at pp. 68-69.

In passing the provisions for conscientious objection to war in the draft laws of 1940 and 1948, Congress had this long history in mind. It intended to preserve the freedom of religion and conscience in regard to conscientious objection, and it provided a machinery whereby such freedom could be preserved. Part of this machinery was the investigation by the Department of Justice, a hearing and an opportunity to be heard. (32 C. F. R. 1626.25 (c).) This investigation must have been provided so that the honest conscientious objector could prove his claim. In view of the history of conscientious objection it would not be right to interpret the investigation as one-sided or a police-state hunt for evidence against the registrant and to hide anything from the registrant that he might be able to use to prove his claim. That would even be inconsistent with the grant of an opportunity to be heard after the investigation. The opportunity to be heard came after the investigation. If the intention was to grant an opportunity to be heard without all the evidence afforded by the investigation, the opportunity for the registrant to be heard would have been afforded before the investigation.

It cannot be imputed that the Congress intended to undermine the fair treatment that was intended by the 1940 act and 1948 act. The evolution of the treatment of the conscientious objector under the 1863 and 1917 acts to the more liberal provisions of the 1940 and 1948 acts shows a definite intent on the part of Congress to prevent basic and fundamentally unfair treatment by an administrative agency which would be condemned in any other case. Surely if the withholding procedure would be invalid under any of the proceedings that are reviewed by the Emergency Court of Appeals it would be invalid in this case.

There must be some compelling policy of emergency to read into the act an intent to treat the conscientious objector unfairly. The holding of this Court in *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, is appropriate. In that case the alien

was deported without a hearing. In reversing the lower court's sustaining the Attorney General, this Court said:

" . . . Where neither Congress, the President, the Secretary of State nor the Attorney General has inescapably said so, we are not ready to assume that any of them has attempted to deprive such a person of a fair hearing.

"This preservation of petitioner's right to due process does not leave an unprotected spot in the Nation's armor. . . .

"For the reasons stated, we conclude that the detention of petitioner, without notice of the charges against him and without opportunity to be heard in opposition to them, is not authorized by 8 C. F. R. § 157.57 (b). . . . "—344 U. S. at pp. 601-603.

Furthermore, Section 6 (j) of the act as amended provides that registrants who are recognized as conscientious objectors shall be assigned to work affecting the national health, safety and interests. Congress did not intend that a person who ought to be available for work affecting the national health, safety, or interests should spend his time in jail because he did not know the secret evidence. It is important for the purpose of utilizing all available manpower to allow a conscientious objector to prove his proper status upon all the evidence in the case including the F.B.I. report.

Section 13 (b) of the Selective Service Act of 1948 (50 U. S. C. App. 463), when properly interpreted, requires a full and fair hearing. While Section 3 (c) of the Administrative Procedure Act (5 U. S. C. 1002) may not be invoked to provide the usual remedy for review of the administrative agency determination, reference can be made to that act for what constitutes a fair hearing in the eyes of Congress. Section 3 (c) of the Administrative Procedure Act shows a congressional policy against concealment of records.

In *Elder* v. *United States* (No. 13,405, 9th Circuit, February 24, 1953) the court reached a conclusion contrary to

that of the court of appeals in these cases. Circuit Judge Healy said that "in the absence of clear intimation in the statute to the contrary the court will not assume that Congress intended these investigative reports to be made public". Note 5 at the very end of the opinion comments: "The court can not assume that Congress was unaware of this departmental policy. In an amendment to § 6 (j) of the Act made June 19, 1951 no change was effected in the provisions thereof quoted in note 3, supra."

The legislative history shows conclusively that there was neither a discussion of nor consideration of the use of the secret police reports in the hearing of conscientious objectors. There was no occasion to consider the illegal practice in the passage of the 1940 act. The question was not drawn to the attention of Congress when the 1948 act was considered.

Members of Congress unequivocally stated that all rights of the conscientious objector should be protected. It was expressly stated in the reports and in the act that the process of selection or classification should be fair.

The contention of the Government that re-enactment of the provisions of the 1940 act by the 1948 act without objection approved such procedure is not borne out by the terms of the 1948 act. This act, in Section 13 (b), provides that Section 3 of the Administrative Procedure Act shall be applicable to functions performed by officials under the 1948 act. Section 3 (c) provides for disclosing official records to a party interested in these proceedings.

It is argued by petitioner that although the hearing procedure was never specifically complained about, the peace organizations and conscientious objector people were aware of the practice. The Government then argues because these groups failed to complain to Congress, there was acquiescence in the inquitous practice of withholding the F.B.I. report. How can it reasonably be contended that violations of the rights of conscientious objectors were acquiesced in by witnesses before Congress?

When witnesses for the conscientious objector groups were before Congress giving testimony, the questions being considered by Congress did not include the hearing procedure. The only questions under consideration were: (1) whether the presidential appeal board should be composed entirely of civilians and separate from the influence of the Selective Service Director, and (2) whether the entire investigation and appeal determination of the conscientious objector status should be handled exclusively and separate by an independent agency, thus taking the entire procedure, including the improper hearing, out of the Department of Justice.

Never at any time in the hearings or in the discussions before Congress was the subject of the F.B.I. report or the nature of the hearing conducted by the Department of Justice considered. These two subjects were completely omitted from all of the discussions leading up to the passage of the 1948 act.

It should be kept in mind that the representatives of the conscientious objector organizations did not bind every conscientious objector in the country by their mere silence. The spokesmen before Congress on the two questions were not acting as representatives of all the conscientious objectors in the country. It is neither fair nor reasonable to contend that Congress approved the illegal procedure of the Department of Justice.

The enactment of the same procedure in the 1948 act that was provided in the 1940 act did not adopt the illegal procedure. Congress did not consider the procedure or indicate they knew of objection to it. If they did then surely it must be assumed that Congress intended to let the courts correct the illegality. It was not the duty of Congress to perform the function of this Court which is now invoked. It is submitted that it would be lawful and proper for this Court to conclude that the legislative history shows a clear purpose to treat the conscientious objector fairly. If so, then the

The administration under the 1940 act became different from that under the 1917 act because no provision was made in the 1917 act for an investigation or hearing.

It is true that the Secretary of War created a board of inquiry during World War I. The members of the board interviewed the registrant concerning his claim. But this type of proceeding had nothing whatever to do with evidence or court process. There was no procedure for getting evidence from other people or from the registrant himself. Such a procedure is hardly like the procedure provided for under the 1940 and 1948 acts.

The Government makes reference to the board of inquiry for conscientious objectors appointed by the Secretary of War, These men, including Dean Stone and Judge Mack, heard conscientious objectors under the 1917 act. The procedure under the 1917 act was not satisfactory. For this reason the investigation, hearing and ultimate classification procedure under the 1940 act were established.

No benefit can be derived from a consideration of the procedure followed by the board of inquiry. It merely interviewed registrants. It made no classifications. It considered no outside evidence. It had before it no secret police report or the benefit of an F.B.I. investigative report. There was no withholding of any evidence from the registrant. The board members merely interrogated the conscientious objector. They made their report and findings. They did not undertake to make a recommendation based upon an exhaustive investigation like that available to the hearing officer and the Department of Justice under the 1940 act and the 1948 act.

We can be sure, however, that men like Harlan Fiske Stone and Judge Julian Mack would neither approve nor resort to police-state procedure, nor consider secret undisclosed evidence to be legal as the Government does here.

The methods of investigation and procedure of the board of inquiry, set up in 1918 by the Secretary of War, as out-

lined in the Government's brief, have no bearing upon the requirements of the 1940 and 1948 acts, which required an appropriate investigation and hearing by the Department of Justice.

During World War I, the registrant checked Series 9 of the selective service questionnaire in order to make a claim for conscientious objector deferment. If the local board allowed the claim, the registrant received a certificate from the local board.—See *Conscientious Objection*, Special Monograph No. 11, Vol. I, Selective Service System, 1950, at page 51.

The reason for exemption from combatant service only is found in Section 4 of the 1917 act. It provided in part as follows:

"'. . . but no person so exempted shall be exempted from service in any capacity that the President shall declare to be non-combatant."—*Conscientious Objection, op. cit.*, page 49.

The setting up of the board of inquiry by the Secretary of War in 1918 was a gratuitous act, a dispensation on the part of the Secretary. Under the 1917 act, no board of inquiry could grant conscientious objector status. The local board alone had this power. Those conscientious objectors who had been recognized already had their certificates from the local boards.

The only function performed by the board of inquiry was to consider requests made by conscientious objectors who already had certificates of recognition of their claim, for deferment from noncombatant service. This was not allowed by law and the conscientious objector had no standing to insist upon any hearing or further grant. In addition to that, the board of inquiry undertook to determine whether it ought to recommend conscientious objector status to those whose claims were not allowed by the local boards, or to those who were making the claim for the first time. There was nothing in the law allowing or requiring this pro-

cedure. The registrant, therefore, had no authority to make any demand of anything. He could make a request which could be respected at the whim of the board of inquiry. —*Conscientious Objection, op. cit.*, pages 57, 59, 60.

The army also granted many exemptions without the assistance of the board of inquiry. The new method set up by the 1940 act, putting into the hands of the Department of Justice the requirement of an investigation and a hearing with notice of the hearing to the registrant, was to be altogether different. Here was the grant of a right. If the investigation were not made or the hearing not held, the classification would become a nullity. The classification process was still going on before the Department of Justice. In 1918 the classification process had already been completed when the board of inquiry came around to see whether it would use some charitable dispensation not recognized by law. No one can complain of a lax hearing when the law does not require a hearing. But, when the law does require a hearing, as did the 1940 and 1948 acts, then the party affected may not be prejudiced by an unfair hearing.

A change of procedure for classifying conscientious objectors from the 1917 act was contemplated by the 1940 act. See *Conscientious Objection*, Special Monograph No. 11, Vol. I by Selective Service System, 1950, at page 67:

"As has been seen, such provisions were similar to those covered by the Selective Service Law of 1917. In the consideration of the 1940 bill, however, a number of suggestions were made for changes. These may be generalized under four headings: . . . providing for special methods of classifying conscientious objectors . . ."

The Government refers to the historically informal procedure for hearing appeal classifications. Congress could have used the same language that it used in the 1917 act had it intended to continue the same procedure used thereunder. However, Congress saw fit to change the 1940 and the 1948 acts so that they provided for "an appropriate investigation and a hearing".

The Government refers to the history of the selective service acts to make the court believe that the type of inquiry and hearing now in use by the Department of Justice is the one that was intended by Congress. However, no act of Congress before the 1940 act provided for an inquiry and a hearing. If Congress meant for history to continue as it had been in the past it would not have used the language changing the methods of the 1917 act.

No emergency demanding the procedure complained of is expressly stated in the act. None can be found in the legislative history. Since the act and regulations give all registrants the right to be informed of the nature of the adverse evidence used by the draft boards (32 C. F. R. 1621.8, 1623.1 and 1626.24), it must be assumed that Congress also intended that the same fair treatment be given to the registrant by the Department of Justice. Does the Department of Justice perform a function different from the board as far as a hearing is concerned? Does the act give the department an immunity that the boards do not have? If Congress wanted to give the Department of Justice a prerogative to be unfair while the draft boards did not have the right, would not Congress have said so?

The registrants have still further reason why Congress intended that the F.B.I. report should be made available to them on their hearings before the Department of Justice. Regulation 32 C. F. R. 1621.8 provides that all papers pertaining to a registrant shall be filed in his cover sheet. It reads in part: " . . . Every paper pertaining to the registrant, except his Registration Card (SSS Form No. 1) and such other papers and documents as may be designated by the Director of Selective Service shall be filed in his Cover Sheet (SSS Form No. 101) until authorization to remove it has been received from the Director of Selective Service."

A report resulting from an investigation by the Department of Justice into the "character and good faith of the conscientious objections of the registrant" (32 C. F. R.

1626.25 (c)) most certainly pertains to the registrant. This report also pertains to the registrant because it is used by the hearing officer to determine his recommendation of classification of the registrant.

Since the F.B.I. report should have been put into each respondent's cover sheet, it was subject to his inspection under the regulation that allows a registrant to see all papers in his file (32 C. F. R. 1606.32 (a)), which reads, in part: "(a) Information contained in records in a registrant's file may be disclosed or furnished to, or examined by, the following persons, namely: (1) the registrant . . ."

The above regulation proves that the Selective Service System sees the intent of Congress to give a full and fair hearing.

The present regulations of the Selective Service System carry out the law. They merely repeat the words of Congress used in the 1940 and 1948 acts. They take nothing from it. Section 1626.25 of the Selective Service Regulations (32 C. F. R. 1626.25) provides in subdivisions (c) and (d) as follows:

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification

of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Attention is called to the above-quoted words, "opportunity to be heard," in Section 1626.25 (c). This again emphasizes the fact that the president has interpreted the draft law to require a fair hearing. Opportunity to be heard cannot be exercised unless all the evidence is produced. The executive interpretation requiring an opportunity to be heard before the administrative agency carries with it the same right to be confronted with the evidence before the Department of Justice appearing in the secret F.B.I. reports. The word "hearing" in the Department of Justice should be given the same interpretation that the word "hearing" has in the Selective Service System. Both departments function under the same act. It would be inconsistent to give the word "hearing" one meaning in one department and a different meaning in another department. Why does a registrant have the right to be confronted with evidence in the Selective Service System and not have it when he is before the investigative arm of the system under the act, the Department of Justice?

Should we adopt the view that Congress did not intend that the F.B.I. report should be revealed to a registrant, then we are attributing to Congress an intention to defeat its own purpose. Congress knew the history of conscientious objection and, beginning in 1940, extended the class of conscientious objectors to include all religious objectors and not only those connected with historic peace churches. An interpretation that would restrict the recognition of conscientious objectors not in accordance with the wishes of Congress ought not to be tolerated. By allowing the Department of Justice to conceal the F.B.I. report there is

put into its hands a dangerous weapon. A hearing officer of the Department of Justice would be given the power to make his report according to his own prejudice, bias or whim. He could ignore vital evidence in favor of the registrant and magnify minor things into monstrosities. He could draw unfavorable conclusions from the F.B.I. report without ever giving the registrant a chance to know or meet that evidence. The hearing officer could make his report to the appeal board so strong that the registrant would have no chance, although he might have been able to show otherwise had the report been made available to him. Hearing officers have a tremendous influence upon the decision of the appeal board, even though they are only advisory.

How many religious objectors have been sent to jail because the F.B.I. report has been concealed nobody knows. But just because we cannot be specific is no reason to believe that justice has been done under a system of concealment. The public gets a wrong impression when conscientious objectors are sent to jail. They feel that the man has been disallowed his claim because he is a "draft dodger". This brings the cause of conscientious objection into disrepute and should not be allowed without the results of the F.B.I. investigation being made known to the registrant. Overzealous hearing officers, in a time of stress, might make such flagrant reports of conscientious objectors, based upon secret evidence, that the cause itself could be seriously impaired, if not endangered.

By concealing F.B.I. reports we put a religious man at the mercy of the atheist, the evil-minded and the base. It comes to the point where any person desirous of dealing religion a black eye can with impunity attack a man's conscientious scruples. The religious objector has no defense to this without knowing the evidence, and the chances are that he will go to jail because an unscrupulous person is believed and a rebuttal is deemed unnecessary. While administrative hearings are not judicial trials they should be conducted in the open, to avoid the injustices mentioned

above. On this see 59 YALE LAW JOURNAL 1451, at page 1466: "Suppression of evidence has little to commend it on any theory, and it is even less defensible when the Government litigates with its own citizens."

The F.B.I. report often is filled with hearsay and adverse statements made by witnesses who may hate or despise the registrant rather than love him as their neighbor. The report may be glutted with conclusions and opinions. It may be filled with damaging name-calling, slurs from persons based on rumors, malice, gossip and hearsay.

It is the policy of the F.B.I. to take statements of any kind and character from any person. (See material on F.B.I. practice brought to light in the Bohlen case, Appendix B to this brief, at pages 197-203.) The F.B.I. does not censor the evidence that it receives. Every kind and character of statement without regard to its legality, source or effect is incorporated in the report.

These reports are handed to the hearing officer. Regardless of how honest the hearing officer may be, it tries his integrity to the limit not to be influenced by this poison that is turned over by the F.B.I. without regard to the rules of evidence.

Since the hearing officer must of necessity be influenced by this evidence there is every reason under the sun why the report must be submitted to the registrant so that he might help the hearing officer do his duty and protect himself. All of this unlimited poisonous material appearing in the F.B.I. report should be qualified by the registrant. If it is not explained away then it will be used against him in the criminal proceedings. This is true, however, though the proceedings are administrative. They ultimately become the basis for criminal prosecution. This poisonous adverse evidence is used against the registrant in criminal proceedings, therefore, without his ever having had an opportunity to rebut the charges, either in the administrative proceedings or in the criminal proceedings against him.

The Government argues that the procedure followed by

the hearing officer prescribed by the Department of Justice is adequate. It says that since the registrant "knows better than anyone else" all facts and their manifestations, the disclosures made by the hearing officer are adequate against "mistaken or malicious statements". Mistaken or malicious statements appearing in the F.B.I. report often are the basis for the recommendation against the claim and the classification denying the conscientious objector status.

If this mistaken or malicious evidence is not directly, pointedly and unequivocally rebutted, no matter how great a number of witnesses may appear in behalf of the registrant, he still is unable to protect himself from the malicious hearsay and gossip relied on by the hearing officer.

The reason for this is that once the classification is established there can be no weighing of the evidence in court proceedings. Not only is there no weighing of the evidence, there is no *de novo* trial. The secret evidence can never be inspected. The registrant never has an opportunity to protect himself against the falsehood or malice in the report that never gets into the record. Unless the registrant is confronted with the precise adverse evidence he cannot rebut it. A general statement of the nature of the evidence is insufficient to enable him to cope with or meet it.

The Government argues that the matters involved upon a conscientious objector hearing are peculiarly within the knowledge of the objector and of persons available to him. This may be true as far as the true facts of his life are concerned. It may be so also as to his beliefs. But these are not the only facts that are dealt with in an F.B.I. report.

A typical illustration of this danger appears in the case of *United States* v. *Annett*, 108 F. Supp. 400 (D. C. Okla. W. D. 1952). In that case Judge Wallace held that Annett was charged with notice that his "sincerity" and "background" were in issue. He then held that it was unnecessary to make a disclosure of the specific derogatory statements relating to his "sincerity" and "background". The court held that since Annett was charged with the notice about

his sincerity it was unnecessary to make a specific disclosure to him.

The danger of this sort of proceeding is indescribable. There is no limit to which administrative agencies may take the people in dealing with them if there is no precise disclosure of the particular adverse evidence.

The petitioner contends that the evidence in the F.B.I. report comes from persons close to the registrant such as friends, neighbors, teachers. It says these are important checks upon the registrant's statements and those of his selected witnesses. It then goes on to say that these friends are the very informants who do not want to disclose evidence unless their identity is hidden. It is our contention that if a person reports that he is a friend of the registrant and is willing to give adverse information against his friend but will conceal from the registrant the fact that he has given adverse information, this is a sign that such person is not a friend but is an enemy. Should the department attach such weight to adverse evidence, basing it upon an elusive supposition furnished? The very fact that a witness refuses to disclose his identity is basis for rejecting his entire testimony. The only exception to this is in cases where his life may be endangered by giving information about a criminal or gangster. It should be remembered, however, that a conscientious objector is not a criminal or gangster. He is "the friend of the informant".

The Government makes reference to the fact that persons interviewed by the F.B.I. are persons "close" to the registrant. The Government then goes a step further and says that these "close" persons always have intimate knowledge of the registrant. A distinction should be made between the close friends and neighbors. A man may have many neighbors who live close to him; yet they will not know very much about him, not so much as close friends and business associates in very distant places. It is a well-known fact that in many cities and towns neighbors know very little about each other. It is entirely different from

small communities and country areas. The Government's use, therefore, of "close persons" to the registrant should be taken with this qualification.

Petitioner places a great deal of weight on its argument that it is necessary to keep the identity of the informants secret. It is said that precise evidence so as to make a disclosure is unnecessary.

The Government says that people who give evidence to the F.B.I. are unwilling to submit to impeachment or cross-examination. The convenience of informants not to have the truthfulness of their statements questioned does not outweigh the tremendous injury that is committed against the victim of secret evidence. If this type of consideration is accepted by the Court, it means permission to administrative agencies to side-step due process of law. Then the end of due process is at hand and the return to the ancient and condemned star-chamber proceedings is here.

If the Court allows this sort of administrative proceedings to be established, the end of truth is at hand. It is more important that truth be the aim of a hearing. Even though evidence is subjected to contradiction, it is better that truth be preserved in the administrative agency. If evidence can be furnished to an administrative agency without being submitted to impeachment and cross-examination, then it will encourage lying, perjury, malice, gossip and all manner of violations of rights and liberties. There would be no end to its evil consequences.

The Government states in its brief that at best the Department of Justice will be hindered in formulating recommendations if there is a disclosure of the names of persons who furnish the information. Are we to deprive registrants of the truth? Surely a report can be made even where witnesses are subjected to a disclosure of their names. Even if the names may not be disclosed, there is still the necessity of furnishing to the registrant all the evidence appearing in the report.

It is argued that the recommendation of the Depart-

ment of Justice is only advisory. The fact of the matter is that while it is advisory, if and when it is accepted, the appeal board in fact relies completely on the recommendation of the Department of Justice which is, of course, based on the information appearing in the F.B.I. report. This report is not available to the registrant but is available to the hearing officer and the Department of Justice. It is never given to the registrant.

To prove that in practice the report was more than merely advisory General Hershey, in *Conscientious Objection*, Special Monograph No. 11, Volume I, Washington, Government Printing Office, 1950, makes a compilation of cases through June 30, 1946, under the Selective Training and Service Act of 1940 and then states: "Data presented in Table 4 show, however, that over three-fourths of the recommendations of the Department of Justice were carried out by the boards of appeal, and that the Class I-A recommendations were more completely agreed to by the appeal boards than any other classification recommended." —Pp. 146-147.

It is apparent from this report by General Hershey of the record of classifications that, although the recommendation of the Department of Justice is advisory, it was usually followed, especially where the I-A classification was recommended by the department. The "Report of the Attorney General for the Fiscal Year Ended June 30, 1944", shows that the recommendations of the Department of Justice were followed in all but 132 cases out of 2,699 between July 1, 1943, and June 30, 1944.—See page 13 of the Report.

The Government states that 95 per cent of the hearing officers' recommendations are concurred in by the Department of Justice. This concurrence necessarily follows the concealment of the F.B.I. reports from the registrants. Since the registrant is unable to rebut the evidence contained in the F.B.I. report, there is no alternative left to the Department of Justice but to follow the recommendation of the hearing officer.

Furthermore this F.B.I report is withheld from the appeal board. This further deprives the registrant of a fair chance to get the proper classification to which he is entitled. The appeal board, not having all of the evidence before it, is not enabled to evaluate properly the recommendation of the Department of Justice. We find that the Department of Justice has set up a very peculiar type of procedure.

Under that procedure the hearing officer and the Department get the F.B.I. report in spite of the fact that they merely make a recommendation and do not classify. The appeal board, which is charged with the final duty of making a classification, never gets the F.B.I. report. This inequality is an absurdity and an anomaly. Documents which should be in the possession of the judge are withheld from him because the prosecutor has said that it is more important for the prosecutor to keep the documents from the judge. The appeal board (the judge) has hardly any alternative but to follow the recommendation of the Department of Justice (the prosecutor), since it does not have the real evidence with which to guide itself. That is why many registrants are deprived of their proper classifications.

The Government's brief states that the "expansion of the 1940 law no longer limited its provisions to members of recognized peace churches". It further says that the problem of appraising sincerity of others outside of the peace churches became acute. This is the reason why a new procedure had to be devised it says. For the first time the Government says it was confronted with the problem of investigating the good faith of conscientious objectors who were not members of any religious organization.

Under these circumstances we agree that a more thorough investigation was necessary. As Senator Gurney said in the congressional debates on the 1948 act, the Department of Justice was interested in getting all of the facts and the investigation would disclose all of the facts. If all of the

facts were to be gotten they had to be gotten by disclosing the evidence in the possession of the F.B.I.

It is well to consider the language of Mr. Justice Black, dissenting in *Shaughnessy* v. *United States* ex rel. *Mezei*, 73 S. Ct. 625, at page 632. There he said: "No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now. Russian laws of 1934 authorized the People's Commissariat to imprison, banish and exile Russian citizens as well as 'foreign subjects who are socially dangerous'. Hitler's secret police were given like powers. German courts were forbidden to make any inquiry whatever of the information on which the police acted. Our Bill of Rights was written to prevent such oppressive practices."

The rule of the exclusion cases does not apply to draft cases; but the rule in the deportation cases does. It is well to consider, therefore, the language of the Court and the dissenting justices in the case of *Shaughnessy* v. *United States* ex rel. *Mezei*, 73 S. Ct. 625. This was an exclusion case. In that case, for security reasons, the Court approved the exclusion of an alien without giving him the adverse evidence.

The Court recognized the difference between the requirement of due process in exclusion cases and that applied in deportation cases. The Court said: "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."—73 S. Ct. at page 629.

The views of the dissenting justices in that case ought also to be considered insofar as they relate to the importance of the right to answer unfavorable evidence. Mr. Justice Black said: "It means that Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor."—73 S. Ct. at page 632.

That is exactly what has happened here. The evidence used against the respondents has been judged by the Department of Justice, the prosecutor. Neither the appeal board nor the court has ever had an opportunity to appraise the evidence appearing in the F.B.I. report, which has been withheld by the prosecutor. Mr. Justice Frankfurter, concurred in the opinion by Mr. Justice Jackson, which said in footnote 9: " . . . If they are not allowed to be present, it is hard to see how it would answer the purpose of testing the Government's case by cross-examination or counter-evidence, which is what a hearing is for. The questions raised by the proposal need not be discussed since they do not call for decision here."—73 S. Ct. at page 634.

The Government states that the reason Congress provided for a hearing in the Department of Justice was to enable the registrant by his "statements and demeanor to demonstrate sincerity". The Government apparently does not consider a hearing for the purpose of rebutting unfavorable evidence. This is a novel interpretation of "hearing". This alien suggestion ought not to be grafted on to due process of law in administrative proceedings.

The hearing officer reaches his conclusion not alone by observation and discussion. He also bases his judgment upon the F.B.I. report. His opinion of the registrant's sincerity and the basis of his objections are never limited to observation. They always include each item and document available to him. One of the most important documents at his hands and used by him is the secret F.B.I. report. This report should, therefore, be made a part of the draft board file. It should be available to the registrant. It is not. This was a violation of the plain intent of Congress.

The Director of Selective Service has emphasized to the entire Selective Service System in an article entitled, "Tolerance Is Faith in Human Rights," the point that observation alone is insufficient. He said:

"The basic difficulty lies in the absence of any accepted methods by which the beliefs and the sincerity of regis-

trants may be tested. The attempt to judge these attributes by what the registrants have done or have said permits a large area of error. Observation of a registrant is far from constant and witnesses are other human beings. These witnesses, moreover, are often prejudiced in favor, if friendly, and contrariwise, if unfriendly. Their membership in a more standardized religious organization often adds, rather than detracts, from the exercise of tolerance to bring unusual methods in the exercise of the right to worship." (*Selective Service*, Washington, Vol. I, No. 12, December 1951.) This is the monthly bulletin of the National Headquarters of the Selective Service System.

The fact that the evidence may have been favorable to Packer does not excuse the withholding of it from the appeal board. It was the obligation of the appeal board to make a fair and just determination. The withholding of the facts favorable to Packer injured him because the appeal board rejected the favorable evidence and denied his claim for classification as a conscientious objector to noncombatant service, on account of its inability to get the facts. Packer also has some rights along with the appeal board under the act. Congress intended that he should be fairly and justly classified. If there was evidence favorable or unfavorable to [redacted] was the duty of the Department of Justice to supply it to the administrative agency. It was for the appeal board to finally determine the claim. The appeal board's being completely in the dark and treated like an outcast by the Department of Justice in the refusal to produce the facts certainly produced injury and an unfair classification of Packer.

If it [redacted]neous to withhold *unfavorable* evidence from the registrant, then it is all the more wrong for the Department of Justice to hold back *favorable* evidence from the appeal board. The purpose of Congress will be defeated if all or any of the facts of the investigation are withheld from the appeal board. No complaint whatever could be made about outside evidence not being placed in

the file if it were not for the fact that Congress provided for the investigation and inquiry by the F.B.I. Since Congress hired the Department of Justice to work for the appeal board in producing all of the facts on the conscientious objector claim, then it is the unequivocal duty of the Department of Justice to complete the job and deliver the goods, the report of the F.B.I.

The rights of respondents, incidental to the appropriate inquiry by the Department of Justice under the act, are not confined to seeing and answering *unfavorable* evidence. Since the act provided that the Department of Justice should turn up all of the facts to the appeal board, whether they were favorable or unfavorable, it was necessary that the report be made a part of the file.

Unless and until the report was put in the file, the procedure contemplated by Congress was not completed. Under the act and regulations Packer was entitled to have all of the favorable evidence placed in the file, as much as he would have the right to be confronted with and answer any unfavorable evidence. The record was not complete since the Department of Justice deliberately tore out of the record a great part of the case. It was a gaping hole that vitiated the entire administrative process.

All of the statements produced by Packer in the file were undisputed. These facts were all favorable to his claim. If the investigation developed no derogatory facts apparently all the evidence developed by the department in the process of the investigation and appropriate inquiry was also favorable. They corroborated Packer's claim. The very fact that the determination ultimately made by the appeal board was arbitrary and capricious proves that it was the duty of the Department of Justice to supply the appeal board with the F.B.I. report. Had the report been furnished to it Packer may never have been denied his claim for classification as a conscientious objector to noncombatant service.

The fact that respondents have the burden of sustaining

their claims does not in any way excuse the Department of Justice from doing its job. If Congress intended to excuse the Department of Justice from investigating and conducting an appropriate inquiry solely because the conscientious objector had the burden of sustaining his claim, then Congress would have said so. It is the appeal board that was entitled to the information withheld from it. The withholding of the F.B.I. report harmed the appeal board. The harm suffered by the appeal board, in turn, injured respondents. Their entire cases were jaundiced by the arbitrary refusal to turn over the records of the investigation and appopriate inquiry by the Department of Justice to the appeal board. Whether the facts corroborated respondents' claim or not is immaterial. It was the refusal to supply the report to the administrative agency that defeated respondents' claims as conscientious objectors to noncombatant service.

It is the Government's contention that the burden of proof is on the registrant to establish his claim of conscientious objection. That is all the more reason why all of the evidence should be revealed. The one who has the burden of proof should be furnished with all of the necessary evidence to enable him to make that proof.

The Government seeks to have the registrant prove his claim to conscientious objection upon evidence which is not disclosed to him. This evidence may be false and often is. Under such circumstances it is impossible for the registrant to bolster his claim or rebut such false evidence because the party who gave it is unknown to him. Unknown evidence can never be rebutted. Unknown witnesses can never be impeached or contradicted.

The Government argues that, because the hearing is characterized by the Department of Justice as "summary and informal procedures" in its notice sent to registrants, it is not necessary to reveal the evidence. This is a new technique in government. Congress did not describe the hearing as "summary and informal". The use of names and

epithets cannot be employed to defeat a right. Even if the hearing were summary, it is necessary to be fair. Suppose it is informal, it is necessary to confront the parties with adverse evidence. The cliche "summary and informal procedures" should not be permitted to mislead the Court. This does not authorize an unfair hearing. It does not authorize deprivation of procedural due process. It does not open the gates to police-state procedure. It amends the act of Congress.

The Department of Justice cannot, by instructions sent to registrants and through orders of the Attorney General, change the type of hearing contemplated by Congress. Irrespective of how summary and informal the procedure may be, it was intended that registrants know the evidence to be relied on by the administrative agency.

The language of the Court in *Londoner v. City and County of Denver*, 210 U. S. 373, applies. In that case the Court said that even though a hearing may be informal, the hearing "in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal".—210 U. S. 373, at page 386.

It should be remembered that the proceedings before the draft boards are also "summary and informal procedures". The president, however, does not claim for the draft boards under the term "summary and informal procedures" the broad powers claimed and arrogated to itself by the Department of Justice. The president has required that all evidence relied on by the draft boards be reduced to writing and placed in the file.—See Sections 1606.32, 1621.8, 1624.2 (b) of the regulations.

It is said that if the F.B.I. report is produced it will mean a full-scale trial before the hearing officer. This does not mean that. While the hearing officer might have the right to subpoena witnesses, if authorized by the Department of Justice, the very least that the disclosure of the F.B.I. report would mean is the right of the registrant to

answer the adverse evidence and not cross-examine witnesses. If he cannot answer the evidence, then the proceeding is worse than no hearing at all.

The statement of dangers and trouble that the Government conjures up about the impeding of the draft law is merely to scare the Court. The word "trial" ought not to sway the Court into believing that a judicial trial will result from a disclosure of the F.B.I. report. There are ways in which the administrator might prevent the slowing up of the draft law or prolix proceedings or a "trial". All that is required by due process is that the evidence be made known and that a full and fair hearing be given. When the registrant has had the right to answer this, together with a full and fair hearing, it would be enough. It is not necessary to have a full formal judicial trial.

Petitioner emphasizes the fact that Congress did not intend to provide a "trial" in its judicial sense. Whether the investigation and hearing be termed a trial or a proceeding is immaterial. There is one thing certain: even though a trial was not intended, secretive evidence also was not intended to be used at the hearing.

The Court, therefore, should not be persuaded by the arguments of the Government on expediency and practicality. The draft law will not be defeated by compliance with the requirements of due process of law. There is a vast difference between giving a person notice of adverse evidence in an administrative proceeding and a judicial trial. The opportunity to rebut adverse evidence does not necessarily mean a judicial trial.

The Government states that the hearing officer has no subpoena powers. Certainly the Government does not mean to say the Department of Justice is rendered so helpless as to have no subpoena powers. Ordinarily in criminal investigation it has no subpoena powers. This is not a criminal investigation. Congress provided for a hearing. A hearing means that the tribunal conducting the hearing has subpoena powers if it chooses to exercise them. Apparently

the Department of Justice in exercising its commission from Congress has neglected to invoke the subpoena powers. Their failure to call up the subpoena powers does not mean to say that the hearing officer does not have it available if the department wanted to give it to him.

The quasi-judicial character of the procedure pervades both the draft board and the Department of Justice in the process of investigation, recommendation and classification of conscientious objector claims. That no subpoena power is conferred upon the hearing officer is said to prove that the proceedings are not quasi-judicial. This is no proof, though. The Department of Justice has subpoena power, if it chooses to exercise it. The act did not strip the department of its subpoena power. If the Attorney General wanted to do so, he could provide for the subpoena of witnesses. This he could do under the provision "appropriate investigation", as well as "hearing". Investigation and hearing both carry with them the right to hear witnesses. The right to hear witnesses means the right to call them. The right to call them spells the power to subpoena.

Even if it were to be concluded that there was no subpoena power, the Government is not right. No subpoena power still does not mean that the Department of Justice is free to stoop to police-state practices in the conducting of conscientious objector hearings. A modicum due process demands the revelation of the F.B.I. report.

It is said that the word "hearing" used by Congress did not mean the taking of testimony before a quasi-judicial administrative body with no power to decide the registrant's claim. It is true that the Department of Justice has no power to decide the claim. It is wrong to say that the hearing officer does not perform a quasi-judicial administrative function. Courts have held that the functions of the Selective Service System are quasi-judicial.—*Gibson* v. *Reynolds,* 172 F. 2d 95 (8th Cir.); *Dodez* v. *Weygandt,* 173 F. 2d 965 (6th Cir.).

Since the draft boards have been held to be quasi-judicial, then the proceedings by another arm of the Government, the Department of Justice (co-operating with the draft boards under the act), are also quasi-judicial.

The mere fact that the hearing leads to a recommendation to the draft board does not change the nature of the procedure from quasi-judicial to a mere general "inquiry" as contended by the Government.

Even Assistant Attorney General Joseph C. Duggan wrote that the hearing officer was "a quasi-judicial officer". —*The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service*, p. 114, Washington, Catholic University of America Press, 1946.

There is a statement in the Government's brief that the F.B.I. report furnishes the hearing officer with crucial leads for questioning the registrant and his witnesses. It further says that this information would not be available if the names or sources were disclosed. If these leads are as crucial as the Government contends, are they not as crucial for the registrant who is seeking to be classified? What is good for the Government is good for the registrant. Why the inequality?

The Government in an indirect way would try to lead the Court to the conclusion that the main thing intended by Congress was the "inquiry". It would have the Court believe that the "hearing" is altogether incidental and inconsequential. Had Congress intended to minimize the hearing, it would have said so. It used the word "inquiry"; then this is followed by the word "hearing". "Inquiry" means what it says. "Hearing" also has a well-understood meaning. "Hearing" comes after "inquiry". Had the hearing been incidental to inquiry, Congress would have provided for the hearing first and then the inquiry.

The very purpose of the inquiry is to develop the facts for the hearing. The hearing is the crux of the matter. It is the ultimate goal of evaluating the evidence covered in the investigation. It is the most important part of the entire

procedure in the Department of Justice. Upon this the hearing officer and the Department of Justice base their recommendations. There cannot be a recommendation until there has been a hearing.

Congress certainly did not intend to treat the procedure in the Department of Justice solely as an investigative and reporting function without a hearing. Congress did not intend to limit it to appropriate inquiry. The procedure explicitly included hearing. Hearing requires findings. A hearing commands a disclosure of the evidence. All evidence, not part of the evidence, must be turned up, lest the findings be illegal.

The Government has put the cart before the horse in insinuating to this Court that the hearing provided for is only incidental to the inquiry. The suggestion therefore ought to be rejected.

The Government tries to stampede the Court with *Williams* v. *New York*, 337 U. S. 241. That case involved the right of the judge to conceal confidential evidence about a murderer on a pre-sentence investigation. The defendant in the case was a gangster. He was given the death sentence on the undisclosed information in the pre-sentence investigation. Where the court has to deal with one who has accessories and friendly hardened criminals, it is often necessary to protect the informants against reprisal. In such a situation, there is every reason for the nondisclosure. Protecting the informant, protects his life, perhaps. A revelation of the name of the informant may spell death to him.

No such danger or any possibility of reprisal exists to the informants providing evidence adverse to conscientious objectors. There is no greater danger to an informant in a conscientious objector case than there would be in any other administrative law proceeding such as proceedings involving labor relations, rate making and deportation cases. What is there so dangerous about a conscientious objector

that puts informants testifying about him in the same category as informants whose names appear in a pre-sentence investigation in murder cases? There is no similarity between the two. The whitewashing of *Williams* v. *New York*, 337 U. S. 241, to assimilate it here has no place in this case. The holding should be put aside.

Another strong reason exists why the holding in *Williams* v. *New York*, 337 U. S. 241, is inappropriate. That case dealt with a subject matter clearly different from a determination. The trial had been held. The guilt of the defendant had already been fixed. The matter of judgment and sentence was something entirely in the discrimination of the judge. The sentencing of a defendant in a criminal case is an act of executing judgment. It involves an exercise of broad discretion on the part of the trial judge. He can consider matters that are inadmissible at the trial. He can hear pleas in mitigation. He can go into the entire background and life of the defendant. The hearing at a sentence and the consideration of the pre-sentence investigation are matters entirely in the discrimination of the judge. It is different from the trial procedure.

Had the withholding of the information in the pre-sentence investigation in the *Williams* case been evidence which the court considered at the trial and were such evidence considered in camera and not divulged to the defendant, then an entirely different situation would have been presented. No court would let a judgment stand where secret evidence had been considered by the court in arriving at a finding of guilt.

The inquiry and hearing conducted by the Department of Justice were for the purpose of turning up evidence to the appeal board to make the determination of whether or not the benefits granted to the conscientious objector status shall or shall not be granted to the particular registrant. It involves a determination of justice, just like a finding of guilt or innocence involves a determination of

justice. The situation here is analogous to the secret consideration of evidence withheld at a trial. It is not at all like the consideration of the pre-sentence investigation report.

Another strong reason, therefore, exists why the *Williams* case is out of place in this case. It is that the extent of punishment assessed is never a question for the appellate courts as long at it is within the law. When a sentence imposed is within the law, it can never be questioned. Anything relating to the punishment (within the law) is entirely immaterial and may not be considered.

The investigation of conscientious objector claims by the Department of Justice is not a part of the criminal investigation process by the department. Mr. Joseph C. Duggan, former Assistant Attorney General in charge of the division in the department conducting the investigations, said that the investigations were "by a division in the Department separate and distinct from that charged with enforcement of the penal sanctions of the Act". *The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service*, Washington, Catholic University of America Press, 1946, page 113, footnote 111. It is plain that the investigation, therefore, is not of a criminal type. The informants, accordingly, are not criminal informants.

Bailey v. *Richardson*, 182 F. 2d 46 (D. C. Cir.) affirmed 341 U. S. 918, relied on by the Government is not in point. The case involved a government employee. She was subject to discharge by the government without consideration, reason or notice. The points of distinction between the cases (and *Bailey* v. *Richardson*, supra) are: (1) there was no provision for a hearing made in the case, (2) there was no question of personal liberty involved and there was no chance of a jail sentence, and (3) the information dealt with in the *Bailey* case concerned security information. There is, accordingly, not the slightest similarity between the *Bailey* case and this case. It is distinguishable. It should

be put aside as having no bearing on the question involved.

Escoe v. *Zerbst*, 295 U. S. 490, is in point. It did not involve a determination. The only point for consideration was the revocation of probation. The Court held that probation was an act of grace. It said that it could be coupled with such conditions as Congress may impose. The Government argued that the district judge who revoked probation under the statute without notice was within his rights. The Court said:

"But the power of the lawmakers to dispense with notice or a hearing as part of the procedure of probation does not mean that a like dispensing power, in opposition to the will of Congress, has been confided to the courts. The privilege is no less real because its source is in the statute rather than in the Fifth Amendment. If the statement of the Congress that the probationer shall be brought before the court is command and not advice, it defines and conditions power. (*French* v. *Edwards*, 13 Wall. 506, 20 L. Ed. 702) The revocation is invalid unless the command has been obeyed.

". . . We hold that the attempted revocation is invalid for defect of power, and that, the suspension still continuing, the petitioner is entitled to be discharged from his confinement."

The *Nugent* and *Packer* cases are closer to the *Joint Anti-Fascist Refugee Committee* case (341 U. S. 123) than they are to the *Norwegian Nitrogen* case (288 U. S. 294). In the *Joint Anti-Fascist Refugee Committee* case there was involved an executive order that provided only for an investigation and appropriate determination. There was no requirement of a hearing. The procedure was not prescribed by the statute as here. It was devised by the president under Executive Order 9835. Even in the absence of a statutory provision for hearing, the Court held that it was unlawful to withhold the secret investigative report.

The Government's brief attempts to assimilate the case

at bar with the *Norwegian Nitrogen* case. (288 U. S. 294) It contends that the hearing results only in recommendation in both cases. However, the recommendation of a hearing officer in a selective service classification proceeding may involve the registrant in a criminal proceeding and cause his conviction. That makes the difference between the case at bar and the *Norwegian Nitrogen* case, *supra*. In the *Norwegian Nitrogen* case the evidence was merely for the information of the president in fixing tariff rates. He could accept or reject such evidence and fix whatever tariff rates appear proper in his discretion. No one may complain regardless of how strong the evidence may be against the recommendation. This is not so in a selective service classification proceeding. The appeal board cannot make a classification "in the teeth of the evidence".

There is a vast distinction between the case at bar and that cited by the Government in the case of *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294. The *Norwegian Nitrogen* case dealt with a determination made by the United States Tariff Commission fixing a new rate of duty. The commission was performing a legislative function. It was not performing a quasi-judicial function like that of the Selective Service System in the classification of registrants. It was contended that the commission failed to give the company a hearing required by the statute. The company was seeking to get evidence in the proceeding by the commission which would have disclosed trade secrets of its competitor. The disclosure of the trade secrets would have caused serious harm to that competitor.

While the evidence not disclosed had a direct relation to the tariff to be fixed, it did not directly pertain to the company. It pertained to all companies. However, the confidential record made by the F.B.I. upon investigation by the Department of Justice deals directly with the registrant, affects the classification of the registrant and may be sufficient to cause his conviction in a criminal case. The

registrant alone is, therefore, most vitally affected by the evidence contained in the F.B.I. report.

The hearing provided for in the Department of Justice to determine the conscientious objector status of the registrant is one that is provided by both the statute and the regulations. The Court approved the procedure followed in the *Norwegian Nitrogen* case because the hearing was not one that could be "demanded as of right".—288 U. S. 294, 304.

Another difference appears in the *Norwegian Nitrogen* case. This factor does not exist here. It was that the change of tariff laws was purely legislative and "not subject to impeachment on the score of invalidity, though notice to those affected has been omitted altogether".—288 U. S. 294, 304.

The classification procedure in a selective service case is, however, fixed by statute. It is something that is subject to judicial review. The validity of the classification depends on whether due process of law has been accorded. There is a vast difference therefore between selective service proceedings and legislative proceedings to fix the tariff. This vital distinction casts the *Norwegian Nitrogen* case to the side.

The hearing that was provided for was said by the Court in the *Norwegian Nitrogen* case to be one "adapted to the consequences that are to follow". (288 U. S. at page 319) The consequences that followed the hearing merely affected tariff. It pertained to a legislative function. It in no sense of the word encroached upon personal liberties. The tariff determination did not affect the freedom of the individual.

It should be remembered that we are dealing here with a question of personal liberty. Property rights are not the subject of the administrative determination. In administrative determinations involving personal liberty there is a

fundamental rule of law that there must be due process of law.—See *Ng Fung Ho* v. *White*, 259 U. S. 276.

In that case the deportation of a resident claiming to be a citizen was involved. The Court held that the Fifth Amendment entitled such person seeking personal liberty to due process and a full and fair hearing. It is significant to note the comment of Mr. Justice Brandeis. He said that deportation deprives of liberty and "may result also in loss of property and life, or all that makes life worth living". —259 U. S. at page 284; see also *Kwong Hai Chew* v. *Colding*, 344 U. S. 590.

Mr. Justice Brandeis again emphasized the requirement of due process of law and a full and fair hearing in personal liberty cases where it may not be granted in property-rights cases. This was in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38.—See his remarks at page 77.

A wide gulf exists between administrative determinations that are quasi-judicial and determinations made by the tariff commission in the exercise of its legislative functions. The gulf is too broad to be spanned here. The Government has failed to bridge the gap. These cases cannot be pushed into a category different from that which the law makes for them. They are as different from the *Norwegian Nitrogen* case as is day from night. The distinction between performance of the legislative function and the making of a quasi-judicial determination in an administrative agency is obvious. This difference saves this case from the fate of the *Norwegian Nitrogen* case.

Another distinction between the *Norwegian Nitrogen* case (288 U. S. 294) and this one is to be found in the opinion in that case. The opinion points out that that feature of the legislative hearing objected to was a hearing that was made "in the development of the process of legislation". The Court quickly added that another section of the tariff law prescribed "the remedy available to an importer after the legislative process had been completed, and the question

is whether the merchandise has been properly appraised". The Court then proceeds to outline the remedy available. The remedy was a hearing subsequent to the order fixing the tariff. This remedy had never been resorted to. What the Court had before it was not an administrative proceeding but a legislative hearing. This vital difference was pointed out in the opinion. The Court said, after reviewing the administrative parts of the act, that this "is the way that Congress spoke when it wished to attach to an administrative proceeding the incidence of a trial in court".—288 U. S. at page 316.

Another thing to be kept in mind about the *Norwegian Nitrogen* case (288 U. S. 294) is that the Court had before it a legislative hearing solely on tariffs. This had been explicitly established by the Congress. Congress did not leave the word "hearing" to be applied in its broad general sense as it is used here. Congress in that case (which it did not do here) specifically prescribed the type of hearing. The Court said: "We are not unmindful of cases in which the word 'hearing' as applied to administrative proceedings has been thought to have a broader meaning. All depends upon the context. There is no denial of the power of Congress to lay bare to the business rivals of a producer and indeed to the public generally every document in the office of this Commission and all the information collected by its agents. The question for us here is whether there was the will to go so far. The answer will not be found in definitions of a hearing lifted from their setting and then applied to new conditions. The answer will be found in a consideration of the ends to be achieved in the particular conditions that were expected or foreseen. To know what they are, there must be recourse to all the aids available in the process of construction, to history and analogy, and practice as well as to the dictionary. . . . . Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights

in a very different way from the report of a commission which merely investigates and advises. The traditionary forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the president may be accepted, modified, or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights. No one has a legal right to the maintenance of an existing rate or duty. Neither the action of Congress in fixing a new tariff nor that of the president in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed. It is very different, however, when orders are directed against public service corporations limiting their powers in the transaction of their business. They may be challenged in the courts if the effect is to reduce the charges to the point of confiscation. (*Smyth* v. *Ames*, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819) They may be challenged for other reasons when they are without evidence supporting them, and are merely arbitrary edicts."—288 U. S. 299, at pages 317, 318.

It is true that what we have here is a report or recommendation that may be "accepted, modified, or rejected". It happens that the recommendation was accepted. It happens also, as the Court said in the quotation above, to do the opposite. It happens to "bear fruit" and "trenches upon legal rights". Herein lies another distinction that exists between the *Norwegian Nitrogen* case (288 U. S. 294) relied on by the Government and this case. The Court in the *Norwegian Nitrogen* case said that in different situations the action may be challenged in the courts. This case is "very different, however" and "may be challenged in the courts".

Another difference is between the exercise of the legislative function in the *Norwegian Nitrogen* case and the performance of the administrative function here. There the Government could fix a new tariff rate in spite of any

contrary evidence. In a draft classification proceeding the appeal board can under no circumstances classify a registrant in disregard of the evidence. The powers of the government in the two situations are entirely different. This difference also pushes the *Norwegian Nitrogen* case to the side. It is inapplicable here.

The Government in footnote 5 states that Nugent "made no further efforts to prepare for the hearing". How could he? There was nothing that he knew of an adverse nature for which to prepare. He went to the office of the hearing officer; not finding him, he was told by the secretary that the F.B.I. report was favorable. At the trial Nugent testified that the "secretary informed me, when I told her of this, that the FBI files were favorable and that I should have no difficulty in receiving my desired classification. And Mr. Gallagher's secretary also asked me if I were going to bring anyone as an advisor, which is stipulated in that paper I submitted to you, your Honor, and I informed her since the FBI records were favorable, I saw no need of it.

"She said, 'That is right, because I feel you should have no trouble in receiving your desired classification because of the good recommendation from the FBI.' I thought no advisor would be necessary. It was merely a routine matter.

"She said, 'You should have no trouble in receiving your classification.' " [N 10, 11]

It is obvious from this testimony that Nugent did all that he could do. He prepared the best possible.

The Government states that Nugent "was given an opportunity again to state the grounds of his conscientious objection". This statement by the Government does not tell the whole story. He was given only a very little opportunity. His opportunity was restricted by the hearing officer who struck out his evidence. The hearing officer restricted his proof and denied him the right to say everything he wanted to say. [N 12, 13]

The Government says again and again that there was no development of derogatory information at the hearings. How could there be such development? It was the duty of the hearing officer to call the unfavorable evidence to the attention of the registrant. He did not do it in either case. The unfavorable evidence was, however, relied upon. The conscientious objector status was denied because of the derogatory evidence which must have been in the report in each case. Neither registrant had notice of any adverse evidence. Therefore it was impossible for them to raise or discuss it at the hearing.

The Government emphasizes that in neither case was the report requested. While Packer complied with the instructions and asked for "the general nature and character" of unfavorable evidence, Nugent did not. Neither could have obtained, however, the F.B.I. report since it would not have been given to them. It would have been futile to ask for it. The departmental regulations forbade the disclosure of the F.B.I. report. The instructions mailed to the registrant confirmed the regulations forbidding the disclosure of the F.B.I. report. These instructions told the registrant that he could not raise any objection "concerning any evidence or any phase of the proceedings".

The Government argues this point as though respondents were lawyers. They were not trained or skilled in law. Like any other registrant, they were unlearned in the law. Respondents had the right to rely upon, and have confidence in, the hearing officer. The hearing officer in each case was a lawyer. In each case he knew that each respondent was ignorant of the law. The respondent was at a distinct disadvantage to cope with the hearing officer in each case.

There was a relationship of trust and confidence between each respondent and hearing officer and each respondent could rely in that trust. The relationship of trust and con-

fidence placed a high responsibility on the hearing officer to be fair. He was not.

He had a duty to make sure there was nothing withheld that should have been made known. He had the responsibility not to rely upon grounds that were not discussed with the registrant. This point is well emphasized by statement made by counsel in the trial court in the *Nugent* case. Concerning the registrant he said that "he is not expected to know all the intricacies of the Selective Service law, nor be thinking all the time what he should do".

The present act and the regulations must be construed more favorably to the registrant than was the 1940 act. The Selective Service Act of 1948 is not backed by a dire emergency as was the Selective Training and Service Act of 1940. Former Attorney General McGranery, when sitting as District Judge for the Eastern District of Pennsylvania, so held in Ex parte *Fabiani*, 105 F. Supp. 139. He discussed extensively the distinction between the two acts. He held that the present act and the regulations must be generously construed in favor of the registrant and strictly enforced against the draft boards. He said that the "purpose of the 1948 and 1951 Acts, to the contrary, is merely to achieve and maintain sufficient armed strength to deter aggression; it is not to prepare for war".

There is no element of national security or national defense secrets involved in investigating the private life of a religious objector to war that commands a sealing of the records. The department admits they must give notice of adverse evidence in the F.B.I. report. If a summary or the substance were all that the Department of Justice had or used, then no more could be demanded. But the Department

of Justice has the best evidence and uses the best evidence in making the recommendation that results in the ultimate determination. It is not willing to supply even secondary evidence. It chooses to decide for itself and censor the original or best evidence and deny the registrant the use of secondary evidence.

A more unfair and unjust method of selection and classification of registrants cannot be imagined. Congress has decreed fair treatment. The Department of Justice has repealed the act. It has set up its own standards for hearings. Not only does it flout Congress, it now defies the courts and the Constitution all of us are sworn to uphold and defend. For what reason is this done? Congress supplies no basis for it. What reason can the Department of Justice give that finds support in the legislation or its history? None! Surely Order No. 3229 and 5 U. S. C. 22 (R. S. 161) do not command a denial of a fair hearing. That order and that statute have been held time and again to be subject to the demands of a full and fair hearing. They have been made to yield to fair play. The privilege is waived when the F.B.I. report is used as here.

Respondents submit that in consideration of the foregoing legislative history it is plain that Congress intended that a full and fair hearing should be given to the registrant by the Department of Justice as well as by the Selective Service System. This policy of fairness at the hearings makes necessary the inclusion of all evidence relied upon. The direct evidence itself must be produced and made part of the record. It is not within the province of the agency to censor the direct evidence or withhold it and hand up a conclusion or summary of the direct evidence. The F.B.I. reports must be made a part of the selective service files.

B. The weight of authority in the decisions in point that deal with departmental Order No. 3229, forbidding disclosure of the confidential records, holds that the privilege of the F.B.I. must yield where the secret evidence is relied upon in reaching the determination.

The first decision rendered on this precise point was in *United States* v. *Oller, Donovan* and *Pekarski,* 107 F. Supp. 54 (D. Conn. July 28, 1952). Judge Smith held that the failure to make a disclosure of the secret investigative police report constituted a deprivation of the rights of the registrant to procedural due process of law. It appeared from the record and the Government contended that the substance of the adverse evidence was given to the registrant and the failure to produce the report at the hearing by the hearing officer was harmless error. The court said, "In the absence of the F.B.I. reports, the Court cannot be certain." He ordered acquittal of Oller and Donovan. The failure to produce the report in the case of Pekarski was found to be harmless because the hearing officer reported favorably to the Department of Justice, which recommended to the appeal board granting of the conscientious objector claim made by Pekarski. The appeal board rejected the recommendation in part, giving Pekarski the noncombatant military service classification as conscientious objector.

The second decision holding that it was the duty of the Department of Justice to produce the F.B.I. report at the hearing, even when not requested, was *United States* v. *Geyer,* 108 F. Supp. 70 (D. Conn., Oct. 10, 1952). Judge Hincks held in that case that the congressional provision for a fair and just selection and classification of registrants required that the F.B.I. statement be made available to the registrant at the hearing. He also shows that the provision for a hearing following the investigation by the F.B.I. was not for the purpose of the registrant's giving additional evidence to supplement the report but that he might have the opportunity to answer and rebut the un-

favorable evidence in the report. Judge Hincks specifically held that the legislative intent implied from the procedure mentioned was to make the F.B.I. report a part of the records of the draft board on the registrant's case. Also, he shows that the departmental recommendation on the claim to the appeal board could not be properly evaluated by the appeal board without the entire report's being made a part of the record. He then holds that the giving of notice of hearing to the registrant implies the production of the F.B.I. report and the making of it a part of the file. Judge Hincks also holds that the provisions in the act and regulations giving the appeal board the right to reject the recommendation implies the right of the board to see the F.B.I. report so that the right can be properly exercised. Finally, he added that he agreed with Judge Smith in *United States* v. *Oller, supra,* that the failure to produce the F.B.I. report at the hearing and make it a part of the draft board records constituted a denial of procedural due process of law.

In *United States* v. *Nugent,* 200 F. 2d 46 (November 10, 1952), the failure to produce the F.B.I. report or a summary thereof at the hearing was conclusively held by the Second Circuit to be harmful because of the failure and refusal of the Government to produce it under proper subpoena and demand at the trial.

This same ruling was followed by the court below in the *Packer* case. The court said, among other things:

"At the hearing before the Hearing Officer of the Department of Justice the defendant was denied the right to see the F.B.I. report on which the eventual recommendation of the Department of Justice to the Appeal Board that the defendant's claim as a conscientious objector be denied was in part based. In *United States* v. *Nugent* (November 10, 1952), (2d Cir.), 200 F. 2d 46, we held such a denial to be reversible error. It is true that in the case at bar the defendant was told that the F.B.I. report was altogether favorable to him. But the correctness of such a representa-

tion was in our opinion a matter which the defendant was entitled to judge for himself by seeing the original F.B.I. record."

In the *Packer* case a subpoena issued for the production of the F.B.I. report at the trial. The subpoena was ordered quashed by the trial court. In the *Nugent* case the court of appeals held that the Government must take the consequences of an unfavorable conclusion that the F.B.I. report was against the Government. In the *Packer* case the court of appeals reaffirmed the holding in the *Nugent* case. In the *Nugent* case the court below adopted the reasoning of Judge Hincks in *United States* v. *Geyer*, 108 F. Supp. 70. It was then held that, even though the defendant did not demand the F.B.I. report to be produced at the hearing or ask for the general nature of the adverse evidence as warned in the written notice from the hearing officer, still it was a violation of the act not to make the report available to him at the hearing. The court held that the report had to be made a part of the files.

In *United States* v. *Bouziden*, 108 F. Supp. 395 (D. C. W. D. Oklahoma, November 13, 1952), it was held that the registrant was not entitled to have the F.B.I. report produced at the hearing. This holding, contrary to the *Nugent* decision, *supra*, on this point, is based on the proposition that the draft board proceedings are not judicial, that the conscientious objector status is one that rests exclusively for the draft boards to determine, and there was no constitutional exemption. The court, however, held that the failure of the hearing officer to call the registrant's attention to the substance of the adverse evidence constituted a deprivation of the rights of the registrant. It was said:

"As directed by the statute the Department of Justice made an appropriate inquiry. Then the hearing was held with the registrant for the purpose of determining the character and good faith of the objections of the registrant to his classification. The undisputed evidence is that no

mention was ever made by the hearing officer of the unfavorable information contained in the Federal Bureau of Investigation report. No opportunity was given to rebut this unfavorable information. . . .

". . . The hearing officer must not be permitted to withhold unfavorable information gained during the inquiry, and giving no opportunity to rebut at the hearing, *then use this same unfavorable information as a basis for his adverse advisory recommendation.* If this is done the hearing itself becomes a sham and a farce. Why hold a hearing to determine a fact if there is a predetermination of the fact and no intent to discuss the basis of the predetermination?"

The court in *United States* v. *Bouziden*, 108 F. Supp. 395 (D. C. Okla. W. D. 1952), distinguished the decision in *Imboden* v. *United States*, 194 F. 2d 508 (6th Cir.), certiorari denied 343 U. S. 957, on the ground that the hearing officer provided the registrant in that case with the substance of the unfavorable evidence and that no complaint was made about the failure to answer but that the contention was made that he did not give the names of the informants to the registrant.—Compare *United States* v. *Annett*, 108 F. Supp. 400 (D. C. Okla. W. D. 1952).

Judge Smith in *United States* v. *Christiano*, Cr. No. 8644, District of Connecticut, November 17, 1952, followed the *Nugent* decision, *supra*. Among other things he said:

"Since the investigative report resulting from the inquiry of the Department of Justice was not made a part of the record for consideration by all directly concerned with the classification, the classification must be held invalid and a judgment of acquittal entered."

Elder v. *United States*, (No. 13,405, Ninth Circuit, February 24, 1953) directly conflicts with the conclusion reached by the court below in the *Nugent* and *Packer* decisions. This decision is similar to that reached by the district court in *United States* v. *Bouziden*, 108 F. Supp.

395, and *United States* v. *Annett*, 108 F. Supp. 400. The district court held that the procedure followed by the Department of Justice in giving the registrant a summary of that part of the F.B.I. report considered to be unfavorable was sufficient. The court of appeals in the *Elder* case imputes to Congress the intention of conducting an investigation similar to that of a criminal investigation. The fallacy of the holding of the court of appeals in the *Elder* case is demonstrated in other parts of this brief in discussing the contentions raised by the Government in this case.

The position of the court of appeals in the *Elder* case and that of the Government here are identical. It is unnecessary to repeat the arguments made elsewhere in this brief that expose the error in the *Elder* decision. The *Elder* decision stands or falls with the Government's argument here.

There is one outstanding distinction between the facts in the *Elder* case and in these cases. In the *Elder* case (see note 4) the court held that the hearing officer stated the substance of the F.B.I. report and that the memorandum of such substance was placed in the file. There is no such summary of the F.B.I. report in either of these cases. If there were such a summary, however, still it would be inadequate. There would be no compliance with the act, the regulations or the requirements of due process.

While the decision of Judge Hincks in *United States* v. *Geyer*, 108 F. Supp. 70, conflicts with that of Judge Wallace in *United States* v. *Bouziden*, 108 F. Supp. 395, it agrees on the distinction of the decision in *Imboden* v. *United States*, 194 F. 2d 508 (6th Cir.). The same distinction is made by both judges.

The *Imboden* opinion ought to be distinguished here. If it may not be distinguished then it is certainly unsound. The fallacy of that opinion will now be demonstrated.

The denial of certiorari in the *Imboden* case, *supra*, does

not import an approval of the holding in any event. Certiorari is granted only in cases of great public importance. Error alone is not sufficient to get the writ, even when egregious. Being a discretionary remedy the Court has, on scores of occasions, warned the bar and lower courts that the denials of writs do not mean that the Court affirms the judgments or approves the reasons stated by lower courts in their opinions. (See *Sunal* v. *Large*, 332 U. S. 174, 181, and *House* v. *Mayo*, 324 U. S. 42, 48.) Compare the remarks of Mr. Justice Frankfurter, dissenting, in *Darr* v. *Burford*, 339 U. S. 200, 227.

The *Imboden* holding, *supra*, must be confined to the point raised. It cannot be said that the court in that case decided it was not a violation of the law to use the hearsay evidence, make no record of it and deny the registrant the right to be notified of the unfavorable evidence to be relied upon. Such point was not raised in the *Imboden* case; it was not decided.

It must be remembered that the Court of Appeals for the Sixth Circuit in the *Imboden* case did not have pressed upon it the statutory construction urged here. The court did not consider the legislative history that demonstrated an intent on the part of Congress to be fair to the registrant in the classification and selection. Had that court considered the legislative history perhaps a different result would have been reached.

That the *Imboden* holding, *supra*, does not reach the question involved here is proved by the above holdings in *United States* v. *Oller*, 107 F. Supp. 54; *United States* v. *Geyer*, 108 F. Supp. 70; and the *Tacker* case, below. The courts in these cases held that the use of the F.B.I. secret report and reliance upon the hearsay evidence in it without giving the registrant, fully and completely, the F.B.I. report or a full copy of the evidence relied upon which was adverse constituted a denial of procedural due process of law.

It can be clearly seen that there is a distinction between the *Oller*, *Geyer* and *Nugent* cases from the *Imboden* case, *supra*. The *Imboden* case did not decide the point raised in those cases or in this case, that the withholding of the F.B.I. report and the failure of the hearing officer to notify the registrant of all of the unfavorable evidence relied upon constitutes a denial of procedural due process of law. There is a vast difference between withholding the name of the informant and using adverse evidence and not giving the registrant notice thereof, which is the case here.

In the *Imboden* opinion there appears an outstanding distinction from the cases here. The court stated that the F.B.I. report went into the file. It is this failure to show the F.B.I. report to Nugent and Packer that is the gist of this point. The thing that is complained of as not being done here was done in the *Imboden* case. The only assertion made in the *Imboden* case was that the names of the informants were improperly withheld. Without agreeing with the *Imboden* opinion it is easy to be seen that the case is not in point.

Here the complaint is much stronger. Here the hearsay testimony given by informants and used against the registrant was not made known to the registrant. Here it is contended that the hearing officer did not give the registrant an opportunity, in advance of the hearing or upon the hearing, to contradict or answer the unfavorable evidence in his hands and used against the registrant by him. The complaint here is that the hearing officer did not show the F.B.I. report to the registrant. The registrant here advances the point that such unfair star-chamber proceedings was not a mere failure to give the name and address of the informants, as was true in the *Imboden* case (194 F. 2d 508 (6th Cir.)), but was a rank and flagrant violation of his right to procedural due process of law.

Should this Court conclude that the case of *Imboden* v. *United States*, 194 F. 2d 508 (6th Cir.), certiorari denied 343 U. S. 957, is not distinguishable, then it is here suggested

that this Court ought not to follow the decision. It is plainly wrong if the effect of the holding is found to be that it is not necessary to produce the F.B.I. report to the registrant at the hearing and place a copy of it in the file. If the decision is to be accepted as supporting the position of the Government in this case, then it is respectfully submitted that it ought to be rejected and not followed, for the reasons above mentioned and hereafter to be discussed.

It is submitted that the holding in *Imboden* that the mere withholding of the names of the informants, whose statements appear in the F.B.I. report, is erroneous. In the circumstances of the investigation and hearing required by Congress in the act, there must be a full and fair disclosure, including giving the names and addresses of the witnesses.

How can there be an appropriate or a full and fair hearing in the Department of Justice unless there is a disclosure of the names and addresses of the informants? Without a revelation of the name and address of a witness whose hearsay evidence is being considered, the registrant is in the dark as to what to combat. Unless he knows or has an opportunity of knowing who is the witness against him, he has no way of answering. He must grope in the dark and guess. He cannot impeach, explain or rebut the evidence. The starting place in answering every witness is to identify him. Masked persons might appear at a masquerade ball but they have no place in the democratic tribunal where truth is the goal.

The requirements of due process in the British Commonwealth demand that the names and addresses of witnesses in administrative proceedings be made known to the parties. *Duncan* v. *Cammell, Laird & Co., Ltd.*, 1942 Appeal Cases 624, so held. The court quoted with approval the language of Chief Justice Eyer thus:

"There is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means

of which the detection is made, should not be unnecessarily disclosed, if it can be made to appear that really and truly it is necessary to the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop."

A statement to much the same effect was made by Abbott, J., and confirmed by Lord Ellenborough, C. J., in *Rex* v. *Watson*, (1817) 32 St. Tr. I. 101.—See also *Marks* v. *Beyfus*, (1890) 25 Q. B. D. 494.

Concealing the names of informants must be confined to informants in criminal investigations. The police and their informants have this privilege. But it is confined to the gathering of evidence for indictment and prosecution. The anonymity of witnesses ceases when the prosecutor produces his case before the tribunal, a court of justice. Due process in judicial proceedings requires this. The same restraint, as well as the intent of Congress to afford the conscientious objector a full and fair hearing, also removes the mask of anonymity in administrative tribunals, including draft board proceedings. Since the hiding of identity of witnesses in judicial tribunals is prohibited, by force of the same reason the concealing of names of witnesses in administrative proceedings is unfair. It prevents a full hearing, in violation of the Constitution.

No reason exists for keeping the names and addresses of the informants in conscientious objector cases secret. No danger to the informant exists, as in the case of one giving information to a prosecutor about a crime that has been committed. Reprisals to the informants are not to be feared. There is no public interest at stake that will be imperiled by making the names of the informants known.

To the contrary the public administration of law and justice will be subserved by forcing the department to reveal the names of persons testifying through hearsay F.B.I. reports. The administration of justice is blighted by keeping the names secret. This is especially true when

the informants are not imperiled and the only one that will be harmed by the practice is the registrant who is kept in the dark and prevented from exercising his right of rebuttal.

Congress reported (Senate Report 1268, 80th Congress, Second Session, page 14) that the exemption "is viewed as a privilege". This same Congress also explicitly stated that it was contemplated that the determination of the status would be according to fair standards consonant with constitutional procedural due-process requirements.

The fact that exemption and deferment from military service is a matter of grace or grant from Congress and is not commanded by the Constitution does not license the executive branch of the government, in the administration of the law, to defy the constitutional requirements of procedural due process.

Restraints of the Fifth Amendment against the denial of procedural due process of law are not confined to hearings before judges in courts. Neither the executive nor legislative branches of the government are above the Constitution. On several occasions the Court has held that both legislative enactments and administrative proceedings that deprive a person of his liberty and property contrary to the requirements of procedural due process of law are in conflict with the Fifth Amendment. —*Dowell* v. *United States*, 221 U. S. 325, 330; *Wong Wing* v. *United States*, 163 U. S. 228; *Diaz* v. *United States*, 223 U. S. 442; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33; *Dismuke* v. *United States*, 297 U. S. 167, 172.

It is a specious argument to contend that because a matter covered by an administrative law is not guaranteed by the Constitution the agency has carte blanche authority to proceed as it wishes. Once a fact-finding agency is established to perform a quasi-judicial function (as the draft boards perform) such agency is, like any other tribunal, subject to the mandate of the Constitution expressed in

the Fifth Amendment. The agency is not autonomous. It may not prescribe and follow police-state methods with impunity. Such is contrary to the Constitution. Congress must accord the parties subjected to an administrative tribunal procedural due process of law required by the Fifth Amendment.

An administrative agency has no escape from the searchlight of the Fifth Amendment. The only way that Congress could avoid an executive department, board or tribunal from being subject to the restraints of procedural due process of law would be to not create an agency with quasi-judicial functions. Congress could have made no provision for an exemption or deferment of conscientious objectors. Had this been done we would not have the question of procedure involved here. But Congress did provide for the exemption. Congress did, however, provide for a quasi-judicial agency to determine the exemption or deferment. Congress provided also for an appropriate hearing and inquiry. The Fifth Amendment to the Constitution makes it mandatory that this administrative agency and the Department of Justice performing the function comply with the requirements of procedural due process of law in conducting an appropriate hearing.

All tribunals are subject to the provisions of the Fifth Amendment. It is well known that the federal courts cannot violate the procedural rights of a litigant guaranteed by the Fifth Amendment. Time and again determinations by an administrative agency (including draft boards) have been upset by the courts because of proceeding contrary to the requirements of procedural due process of law. The Department of Justice has no higher standing under the law than a draft board. Since the draft board proceedings themselves have been destroyed by the Fifth Amendment, notwithstanding the lack of a constitutional guarantee of exemption or deferment, then by force of the same reason the violation of the Fifth Amendment by the Depart-

ment of Justice in withholding the F.B.J. report also should be held invalid.

The basic fallacy of the decision in *Imboden* v. *United States*, 194 F. 2d 508 (6th Cir.), is the justification of the denial of due process of law because the recommendation of the Department of Justice was merely advisory. This is a broken link in the process of reason employed by the court of appeals in that case. Another unsound basis for the decision of the Sixth Circuit is that there is no constitutional guaranty for the making of the claim for exemption or deferment as a conscientious objector. This ground is no stronger than the one just stated, that the recommendation of the department is merely advisory. This argument of the court is equally riddled with sophistry.

The act and regulations make the recommendations of the Department of Justice to the appeal board merely advisory. That may be rejected by the appeal board. The appeal board may classify a registrant as liable for training and service in the armed forces when the Department of Justice recommends that he be classified as a conscientious objector, or vice versa. The Government argues that, because of this advisory nature of the recommendation, the Department of Justice can successfully refuse to give the registrant due process of law. The Government argues that it is not bound to place all the evidence in the file as the draft board is required to do purely because the report is advisory in nature.

It is true that the investigation and recommendation of the Department of Justice are merely advisory. This does not make the use of the illegal F.B.I. report and the nondisclosure of the names of the informants harmless error. The report was relied on. Were it not for the adverse testimony of anonymous witnesses the claim for conscientious objector classification would not have been denied.

It cannot be said that it is harmless error when the rights of the registrant here were denied by the use of the

F.B.I. report by the hearing officer and the appeal board.

The F.B.I. report was embraced, accepted and adopted by the appeal board. The unconstitutional procedure of the Department of Justice was adopted as the unconstitutional procedure of the Selective Service System. The appeal board made the invalid proceedings its own. Since the order to report is based on proceedings had before the Department of Justice, the use of the report by the draft boards vitiated the entire proceedings.

It is harmless if the report of the department is against the registrant and the appeal board grants the conscientious objector status. But when the appeal board accepts the recommendation to deny the status claimed by the registrant a different situation entirely is presented. The hearing officer has and relies on the report of the F.B.I. The Assistant Attorney General, making the recommendation to the appeal board, relies on the report of the hearing officer which is based on the F.B.I. report. The Attorney General also has before him, in making the recommendation, the F.B.I. report. He tests the report of the hearing officer with it. His recommendation is based not only on the report of the hearing officer, but also on the F.B.I. secret police report. The board of appeal in more than ninety cases out of a hundred relies on the recommendation of the Department of Justice especially when the recommendation is adverse. In this case the board of appeal accepted and adopted the recommendation of the Department of Justice based mainly on the F.B.I. report.

It is then only proper, necessary, fair, constitutional and in compliance with due process of law that the evidence gathered and recorded by the Federal Bureau of Investigation be included in the cover sheet. It was relied on by the hearing officer. The hearing officer's report was relied on by the Department of Justice in making its recommendation to the appeal board and the appeal board relied on the recommendation supported by the F.B.I. report. By all principles of fairness this evidence ought to be made avail-

able to the registrant on his trial. Without being provided the F.B.I. report the registrant is denied the right to show that there is no basis in fact for the determination made by the appeal board based on the recommendations made by the Department of Justice and the hearing officer on the conscientious objector claim of the registrant.—*Estep* v. *United States*, 327 U.S. 114; *Kwock Jan Fat* v. *White*, 253 U. S. 454.

The error and harm produced by the use of the F.B.I. report can be demonstrated by an analogy. There are certain types of judicial proceedings where the jury verdict is merely advisory. If misconduct of counsel, the jury or the court in violation of constitutional rights occurs in a trial where the verdict is merely advisory, it certainly would be ground for a new trial and reversal on appeal if the unconstitutional proceedings before the jury resulted in the verdict which was accepted by the trial court. This is what happened here. The adverse verdict against the registrant was accepted by the appeal board. The unconstitutional trial before the hearing officer invalidated the proceedings before the appeal board when the Department of Justice recommendation, adopting the hearing officer's report, was followed by the appeal board.

Suppose an attorney, during a trial before a jury in a case where the verdict was advisory, handed to the jury an exhibit that had been excluded from evidence. Also assume that the adversary did not learn of this until after entry of judgment. Putting aside the liability of the attorney for contempt of court, would it be doubted that the verdict and judgment would be set aside even if the verdict were advisory? The same situation exists here.

A chain is no stronger than its weakest link. The recommendation of the Department of Justice and its acceptance by the appeal board becomes a link in the chain. Since it is one of the links of the chain, its strength must be tested. (*United States* v. *Romano*, 103 F. Supp. 597 (S. D. N. Y. 19[illegible]).) The absence of the F.B.I. report from the

record and the withholding of it from the registrant at the hearing produces a break in the link and makes the entire selective service chain useless, void and of no force and effect. The Court held in *Kessler* v. *Strecker*, 307 U. S. 22, that if one of the elements is lacking, the "proceeding is void and must be set aside". (307 U.S. at page 34) The acceptance of the recommendation of the Department of Justice which has been made up without producing the F.B.I. report to the registrant in the proper time and manner makes the proceedings illegal, notwithstanding the fact that the recommendation is only advisory. The embracing of the report and recommendation by the appeal board jaundiced and killed the validity of the proceedings.

This view of the reliance upon the recommendation of the Department of Justice making the report of the hearing officer and the recommendation a vital link in the administrative chain is supported by *United States* v. *Everngam*, 102 F. Supp. 128 (D. C. W. Va. 1951). In that case the court said:

"Under these statutory provisions, the hearing, report, and recommendation of the Department of Justice is an important and integral part of the conscription process for the protection of both the government and the registrant. The defendant had the right to have a fair hearing and a non-arbitrary report and recommendation by the Department of Justice to the appeal board.

"It does not appear that any member of the appeal board felt himself bound by this report and recommendation or how far, if at all, it influenced the decision of the appeal board, but that is not enough. The report and recommendation was transmitted to the appeal board to use as an advisory opinion, and was considered and used (as the regulations require) by the appeal board in its subsequent classification of the defendant."

This quotation was made and approved in *United States* v. *Bouziden*, 108 F. Supp. 395 (D. C. W. D. Okla. Novem-

ber 13, 1952). It is respectfully submitted that the fact that the act and regulations make the recommendation advisory does not prevent the broken link from ruining the required continuously legal chain.

It is respectfully submitted that the principles announced in the *Bouziden, Annett* and *Elder* cases should be rejected by this Court. A reading of those opinions discloses that the courts reached their conclusions without reference to Section 13 (b) of the Selective Service Act of 1948 and of the Universal Military Training and Service Act. This Court, it is submitted, ought to adopt the holding of the court below as the law applicable here.

It is submitted that the decisions in *United States* v. *Oller*, 107 F. Supp. 54; *United States* v. *Geyer*, 108 F. Supp. 70; and *United States* v. *Nugent*, 200 F. 2d 46, correctly interpret the law. They are in accordance with the congressional intent expressed in the act. They are also supported by the legislative history which shows the plain purpose of guaranteeing to the conscientious objector his rights fixed by Congress in the passage of the act and implemented by the president in the Selective Service Regulations—the policy or orders of the Attorney General to the contrary notwithstanding.

6. If the act is interpreted so as to authorize the procedure of the Department of Justice in refusing to disclose the F.B.I. report to the registrant and the board under Order No. 3229, then the construction will be unreasonable and produce penalties. This is condemned by this Court.

A reasonable interpretation of the statute by this Court is due, indulging all reasonable doubts concerning the meaning of the act in favor of the rights of one indicted thereunder. (*Harrison v. Vose*, 50 U. S. 372, 378) It has been said that a sensible construction should be placed on an act so as to avoid oppression, absurd consequences or flagrant injustice. It will be presumed that Congress in-

tended to avoid results of such character. (*United States* v. *Kirby*, 7 Wall. 482, 486-487; *United States* v. *American Trucking Ass'n*, 310 U. S. 534) Where a statute is susceptible of two constructions "by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter". (*United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408) The argument of the Government requires the Court to place an unreasonable construction upon the act. Additionally it raises "a succession of constitutional doubts as to such interpretation".—*Harriman* v. *Interstate Commerce Comm'n*, 211 U. S. 407, 422.

It is the duty of the Court to interpret criminal statutes so as to permit the accused to make any reasonable defense and to avoid penalties and oppression. In the cases at bar the Court must indulge in a fiction to say that Congress specifically intended that hearings be based on secret evidence withheld from the registrant. Had Congress so intended, it would not have done so "by artifice in preference to plain terms. It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process". (*Western Union Tel. Co.* v. *Lenroot*, 323 U. S. 490.) See also *American Power Co.* v. *S. & E. Comm'n*, 329 U. S. 90, where the Court said:

"Wherever possible, statutes must be interpreted in accordance with the constitutional principles. Here, in the absence of definite contrary indications, it is fair to assume that Congress desired that § 11 (b) (2) be lawfully executed by giving appropriate notice and opportunity for hearing to all those constitutionally entitled thereto. And when that assumption is added to the provisions of § 19, it becomes quite evident that the Commission is bound

under the statute to give notice and opportunity for hearing to consumers, investors and other persons whenever constitutionally necessary. See *The Japanese Immigrant Case*, 189 U. S. 86, 100-101."—329 U. S. at page 108.

The Court, on this same subject, said in *Lipke* v. *Lederer*, 259 U. S. 557: "And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded. See *Fontenot* v. *Accardo*, 228 Fed. 871."—259 U. S. at page 562.

"So, in *Central of Georgia R.* v. *Wright*, 207 U. S. 127, 138, the Court said: 'This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace.' In *Roller* v. *Holly*, 176 U. S. 398, 409, the Court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' And in *Louis. & Nash. R. R.* v. *Stock Yards Co.*, 212 U. S. 132, 144, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such'."—*Coe* v. *Armour Fertilizer Works*, 237 U. S. 413 at page 425.

Chaloner v. *Sherman*, 242 U. S. 455, at page 460, says: "Such notice and opportunity to be heard at the inquisition was required by the law of New York though not expressly recited in the statute."

If the statute is not interpreted in such a way as to afford the respondents the right to have produced and made a part of the selective service files the F.B.I. report, then grave doubts arise as to the constitutionality of the prescribed procedure. To avoid such consequences, the interpretation here suggested should be accepted.

Two

The investigations and hearings, using the F.B.I. reports, under Section 6 (j) of the Selective Service Act of 1948, must comply with due process of law, which demands that the investigative reports be shown to the registrants and also placed in their draft board files.

A. It is immaterial that the conscientious objector status is a grant from Congress and not a constitutional right.

It is argued that because the conscientious objector status is a privilege and not a right it is not necessary to follow due process. While the status is a privilege granted by Congress, it does not mean that the constitutional rights of the registrant to a full and fair hearing guaranteed by the due-process clause of the Fifth Amendment can be forfeited and taken away from him.

This position of the Government is answered earlier in this brief where the case of *Imboden* v. *United States*, 194 F. 2d 508 (6th Cir.), is shown to be erroneously decided, *supra*, pp. 103-112.

This same kind of argument was made by the Government in *Estep* v. *United States*, 327 U. S. 114. It argued that the defense could not be made by Estep. The Court rejected the argument that merely because exemption and deferment were privileges the constitutional rights of the registrant to procedural due process of law could be violated. The limited defense permitted in the *Estep* case also makes the validity of the draft board proceedings dependent upon a very strict compliance with the principles of fair play. This means that a full and fair hearing in the Department of Justice as well as in Selective Service System must be accorded.—*Estep* v. *United States*, 327 U. S. 114.

If the lack of the constitutional right to exemption did not permit a denial of a full and fair judicial hearing in the courts called upon to prosecute cases under the act,

then why may the Department of Justice claim that it does not have to abide by due process in its administrative hearings?

It is well known that practically every administrative agency of the federal government operates in fields that are not covered by the Constitution as far as the substantive right to operate in the field is concerned. The courts have, nevertheless, required the administrative agencies carrying out the governmental regulations in the field to abide by the standards of procedural due process in administering the regulatory power of the Government. The courts have repeatedly held that the administrative agencies are subject to the restraints of the due-process clause of the Fifth Amendment. It has always been held that the due-process clause reaches administrative agencies.—Vom Baur, *Federal Administrative Law*, § 297, p. 302, Chicago, Callaghan & Company, 1942.

At an early date it was held that the right to enter this country as an alien was not a right guaranteed by the Constitution. It was held to be a statutory privilege that could be determined by administrative agency, whose determination was final. The situation is identical to that involved here. In *The Japanese Immigrant Case*, 189 U. S. 86, it was argued by the Government that because there was no constitutional right but only a statutory privilege or grant involved the procedural due-process requirements of the Fifth Amendment could not be resorted to by the immigrant. While the exclusion order was not disturbed and the dismissal of the habeas corpus petition was sustained, the Court took occasion to reject the argument of the Government that the due-process clause did not reach the orders of Commissioner of Immigration. In that case it was said that—"this Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental prin-

ciples that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act."—189 U. S. 86, at pp. 100-101.

It is unnecessary for the administrative agency to accord a judicial trial as a part of due process. (*United States* v. *Ju Toy*, 198 U. S. 253, 263) It is necessary that the procedural steps be otherwise in accordance with the requirements of the Fifth Amendment guaranteeing notice and the right to defend or answer a charge. (*Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*, 227 U. S. 88, 91-92.) The Court has held that where a statute provides for an administrative hearing the due-process clause of the Fifth Amendment requires a full and fair hearing in the sense of the traditional hearing.—*Shields* v. *Utah-Idaho Central R. Co.*, 305 U. S. 177, 182.

Professor Wigmore in his great work on *Evidence*, in Volume 1, section 4 (b), page 34, says: "The Federal Supreme Court has occasionally (ante sec. 4a) pointed out what it considers to be the essentials of a fair trial of fact by administrative officials—the opportunity to call witnesses, the opportunity to hear the evidence on the other side, and so on. But these casual designations do not cover even the fundamentals of a simple system of proof." —See also *Dismuke* v. *United States*, 297 U. S. 167, at p. 171.

This Court recently held in *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, that the denial of the opportunity to be heard is a violation of due process of law. The Court said:

"It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law.... Although Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard....

"For the reasons stated, we conclude that the detention of petitioner, without notice of the charges against him and without opportunity to be heard in opposition to them, is not authorized by 8 C. F. R. § 175.57 (b)."—344 U. S., at pp. 596, 597-598, 603.

A somewhat different rule has been reached by the Court, however, in exclusion cases. The deportation rule stated in the *Kwong Hai Chew* case was not extended to the exclusion case where there was involved a security risk. The Court held in *Shaughnessy* v. *United States* ex rel. *Mezei*, 73 S. Ct. 625, that an alien could be excluded from entry into the United States without a hearing. This power of exclusion was said to be a fundamental attribute of governmental sovereignty. It is observed that the rule of exclusion cases does not apply in draft board determination cases. Compare *United States* v. *Reynolds*, 73 S. Ct. 528. In that case the Court held that a widow suing for the negligent death of her husband under the Federal Tort Claims Act could not demand an air force report of the accident filed by the Secretary of the Air Force. There appeared in that case a reasonable possibility that military secrets were involved. National security is not involved here, as has been demonstrated in this brief.

There seems to be no doubt whatever that the Fifth Amendment reaches administrative agencies. The draft boards and the Department of Justice are not beyond the rea h of the Fifth Amendment. The above discussion shows that the Department of Justice is as much under the re-

straint of the Fifth Amendment as are the draft boards when it steps in and begins to perform its function of investigation, conducting a hearing and making a report. This conclusion is inescapable when the recommendation of the Department of Justice is adopted or followed by the appeal board and the claim of the registrant is denied. (See *N. L. R. B.* v. *Cherry Cotton Mills*, 98 F. 2d 444, 446.) Mr. Justice Frankfurter, in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, said:

"'The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

"An opportunity to be heard may not seem vital when an issue relates only to technical questions susceptible of demonstrable proof on which evidence is not likely to be overlooked and argument on the meaning and worth of conflicting and cloudy data not apt to be helpful. But in other situations an admonition of Mr. Justice Holmes becomes relevant. 'One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point. . . .' It should be particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe. . . .

"Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking, and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case

against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done. . . .

". . . But it does place upon the Attorney General the burden of showing weighty reason for departing in this instance from a rule so deeply inbedded in history and in the demands of justice. . . . This surely does not preclude an administrative procedure, however informal, which would incorporate the essentials of due process. Nothing has been presented to the Court to indicate that it will be impractical or prejudicial to a concrete public interest to disclose to organizations the nature of the case against them and to permit them to meet it if they can."—341 U. S. 123, at pp. 170-173.

If a defendant were not allowed to meet the evidence in a criminal trial, there would be no question that he is denied due process of law. Should the defendant in a criminal proceeding charging him with violation of an administrative order be deprived of the right to see and meet the evidence at the administrative hearing, then by force of the same reason he is convicted without a chance to meet the evidence. The administrative shield is a mere gossamer covering. It does not protect the Government. The substantial rights of the defendant in a criminal proceeding in such circumstances are violated.

This is precisely what the court below meant when it said: "True, the hearing here was not a criminal trial. But its effects on defendant might be fully as important." [N 63]

A similar expression was made in a dissent of Mr. Justice Frankfurter. He said in the case styled In re *Oliver*, 333 U. S. 257, at page 284: "But an opportunity to meet a charge of criminal contempt must be a fair opportunity. It would not be fair if the court in which the accused can contest for the first time the validity of the charge against him, he comes handicapped with a finding against him

which he did not have an adequate opportunity of resisting."

When the proceedings of the Department of Justice are made a part of the administrative chain there can be no question that the proceedings in the department are as much subject to the requirements of procedural due process of law as are the draft board proceedings. The proceedings before the draft boards, themselves, have been held to be subject to the requirements of procedural due process of law. Time and again the determination of the draft boards has been set aside because of violation of procedural due process of law. *United States* v. *Zieber*, 161 F. 2d 90 (3rd Cir.); *United States* v. *Stiles*, 169 F. 2d 455 (3rd Cir.); *Niznik* v. *United States*, 173 F. 2d 328 (6th Cir.); *Niznik* v. *United States*, 184 F. 2d 972 (6th Cir.); *Davis* v. *United States*, 199 F. 2d 689 (6th Cir.); *United States* v. *Garvin*, 71 F. Supp. 545 (W. D. Penna.); *United States* v. *Romano*, 103 F. Supp. 597 (S. D. N. Y.); *United States* v. *Strebel*, 103 F. Supp. 628 (D. Kans.); *United States* v. *Laier*, 52 F. Supp. 392 (N. D. Calif. S. D.); *United States* v. *Peterson*, 53 F. Supp. 760 (N. D. Calif. S. D.); Ex parte *Stanziale*, 138 F. 2d 312 at p. 314 (3rd Cir.); *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876 (8th Cir.); *Cox* v. *Wedemeyer*, 192 F. 2d 920 (9th Cir.).

The steps to be taken as a condition precedent to induction must be strictly followed. Otherwise the order to report is void. (See *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876, 881 (8th Cir.).)

"There must be a full and fair compliance with the provisions of the Act and the applicable regulations." (*United States* v. *Zieber*, 161 F. 2d 90 (3rd Cir.). See also Ex parte *Fabiani*, 105 F. Supp. 139.) It should be remembered that the hearing officer's report and the recommendation of the Department of Justice come to the appeal board with great weight. As already shown, the recommendations of the Department of Justice are followed in over ninety-five per cent of the cases. By force of

the same reason, if the draft board must follow accepted standards of procedural due process, then the hearing officer and the Department of Justice likewise must comply with such standards of fairness.

It is respectfully submitted that the provisions of the due-process clause guaranteeing procedural fairness in hearings reaches the Department of Justice as well as the draft boards when it steps into the administrative shoes provided for in the act and regulations.

B. Due process of law condemns star-chamber proceedings by administrative and judicial tribunals.

The procedure of trying a person in his absence or hearing evidence on trial out of his presence was well known to the authors of the Constitution and the Bill of Rights. The experience of their forefathers under the Court of Star Chamber in England was fresh in their minds. It was a common practice of that ancient iniquitous court to hear evidence *de hors* the record. Witnesses were permitted to give unsworn testimony and whisper into the ears of the judges. Prosecutors could approach the bench and supply evidence in the absence of their adversary. Secret evidence was considered without the opportunity to answer, rebut or impeach it.

The unfair star-chamber procedure employed by the Department of Justice in this case was expelled from the law of England when the Court of Star Chamber was finally done away with by James II following a short resurrection of the court after its first abolishment in 1641.—Cooley, *Constitutional Limitations,* 8th ed., Vol. I, pp. 715-716, Boston, Little, Brown & Co., 1927.

In the celebrated *Doctor Bentley's Case* (*Rex* v. *Cambridge University,* 1 Strange 557, 567 (1718)), a hearing and the right to defend were denied upon the trial involving the validity of an illegal writ. Justice Fortesque in that

case said: "The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defense. 'Adam [says God], where art thou? Hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also."

The right to answer and defend is the only way that the democratic system can maintain respect and avoid sliding into oblivion. The Mosaic law allowed a defense. Even the barbarians and ancients permitted notice and allowed a defense. The Roman philosopher and lawyer, Seneca, in the days of Nero, wrote: "Who hath adjudged of aught, one side unheard, just though the judgment, were himself unjust."

The degeneration of the judicial system under the influence of the Holy Roman Empire through trials by ordeal was arrested in England and banished forever when the people compelled King John to put his hand to the Magna Carta, the 39th chapter of which provides that: "No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."

A full and fair hearing and the right to know the charge and present all defenses is as much established as a part of due process of law in criminal procedure as the Bill of Rights is established in the Constitution. McGehee, in his work, *Due Process of Law*, says: "The requirement of conformity to the 'law of the land' was intended as a guaranty against certain arbitrary proceedings on the part of the king, the enforcement of execution without any judgment, or after a mere pretext of judgment; and that the most that was guaranteed was judgment by some of the known con-

temporary methods of trial, ordeal, battle, or compurgation. [page 5] . . .

"Justice requires that a hearing and an opportunity to present defenses must precede condemnation. Around this ideal of justice has grown up the constitutional conception of 'the law of the land' or 'due process of law', but the ideal was not confined to one system of jurisprudence, and was common to thoughtful men everywhere [page 73]."

Justice Cooley, in his *Constitutional Limitations, supra,* says: "Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society.'"—P. 736.

The denial of the right to know and defend a charge is a modern-day trial by ordeal, which pulls the Selective Service System back beyond the date of its beginning, into the Dark Ages of the Inquisition.

In *Windsor* v. *McVeigh*, 93 U. S. 274, plaintiff's property had been taken from him by the agents of the federal government. In ejectment proceedings his answer was stricken and he was denied a hearing. The Court, at pages 277 and 278, said: "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. . . .

". . . But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear

and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceedings had better be omitted altogether."

It is respectfully submitted that the procedure employed by the Department of Justice in withholding from the registrant the evidence that it makes its determination upon is the modern-day practice of the Court of Star Chamber. This type of proceeding, regardless of what sort of modern covering it is wrapped in, still is condemned by the due-process clause as the anathematized ancient star-chamber proceedings. It is not valid when practiced by the Department of Justice or by any other branch of the government. —See also the concurring opinion of Mr. Justice Black in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 146, 148, 149.

C. Due process requires an opportunity to know the evidence used, even when confidential.

The law of the land (due process) in requiring fair play led the Court to reach the results that it did contrary to the opinions of all the lower federal judges (except two) when it decided *Estep* v. *United States*, 327 U. S. 114.

The Court interpreted the 1940 act to require a hearing in courts so that there could be no constitutional jurisdictional or due-process violation. It also contemplated an interpretation of the act and regulations that gave meaning to the limited defense that it permitted; that is, it was of grave concern to the Court that when a defendant came in to defend a charge against him he had been accorded full protection in the administrative proceeding. Speaking for the Court in *Estep* v. *United States*, 327 U. S. 114, Mr. Justice Douglas said:

"But if we now hold that a registrant could not defend at his trial on the ground that the local board had no

jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by *habeas corpus*.

"... Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case."—327 U. S. at pp. 124, 125.

Mr. Justice Murphy, concurring, said at pages 126-127, 128:

"... Thus the stigma and penalties of criminality attach to one who willfully disobeys an induction order which may be constitutionally invalid, or unauthorized by statute or regulation, or issued by mistake, or issued solely as the result of bias and prejudice. The mere statement of such a result is enough to condemn it. ...

"*First*. It is said that Congress so designed the Selective Training and Service Act of 1940 as to preclude courts from inquiring into the validity of an induction order during the course of a prosecution under § 11 for a willful failure to obey such an order. But if that is true, the Act is unconstitutional in this respect. Before a person may be punished for violating an administrative order due process of law requires that the order be within the authority of the administrative agency and that it not be issued in such a way as to deprive the person of his constitutional rights. A court having jurisdiction to try such a case has a clear, inherent duty to inquire into these matters so that constitutional rights are not impaired or destroyed. Congress lacks any authority to negative this duty or to command a court to exercise criminal jurisdiction without regard to due process of law or other individual rights. To hold otherwise is to substitute illegal administrative discretion for constitutional safeguards. As this Court has previously said, 'Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement de-

signed to give effect to administrative action going beyond the limits of constitutional authority.' (*St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 52) This principle has been applied many times in the past for the benefit of corporations. (*Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287, 289; *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456, 486; *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 432; *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210.) I assume that an individual is entitled to no less respect. . . .

"A construction of the Act so as to insure due process of law and the protection of constitutional liberties is not an amendment to the Act. It is simply a recognized use of the interpretative process to achieve a just and constitutional result, coupled with a refusal to ascribe to Congress an unstated intention to cause deprivations of due process." —327 U.S. at pp. 126-127, 128.

It was argued by the Government and held by the federal courts that silence of the act implicitly required that the defendant in a criminal prosecution under the act be denied the right to challenge the validity of the draft board order with which he refused to comply. The act contained no explicit provision commanding the right to make the defense. The Court held that it was intended by Congress that a full and fair judicial hearing ought to be accorded a registrant in order to protect his rights. By force of the same reason it must be assumed that procedural due process requires that the term "hearing" used in the act for the determination of conscientious objector claims demands a full and fair hearing in the sense that the word "hearing" is used to mean in administrative law. In the absence of any explicit provision in the act it must be assumed that Congress had in mind a full and fair hearing commanded by the due-process clause of the Fifth Amendment. The fact that the secret investigative report of the F.B.I. was held to be confidential

by the Attorney General (40 Op. A. G. 8, 1941) does not in any way destroy or weaken the great commandment of procedural due process in the Fifth Amendment, recognized in Section 13 (b) of the Selective Service Act of 1948.

It has been held that a party does not have the right to delve into and pry into all the records of an administrative agency or examine secret reports not directly relied on. (*United States* ex rel. *St. Louis Southwestern Ry. Co.* v. *Interstate C. C.*, 264 U. S. 64; *United States* v. *Abilene & S. Ry Co.*, 265 U. S. 274.) It has also been held that procedural due process requires that where the facts contained in a secret report are relied on by the administrative agency it must be produced and made available at the trial. "If that were not so, a complainant would be helpless, for the inference would always be possible that the court and the Commission had drawn upon undisclosed sources of information unavailable to others. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known." Mr. Justice Cardozo in *West Ohio Gas Co.* v. *Public Utilities Comm'n*, 294 U. S. 63, 68, 69.

Another important case on this subject is *Morgan* v. *United States*, 304 U. S. 1. That case presented a question on the validity of an order of the Secretary of Agriculture. He fixed maximum rates charged by market agencies under the Packers and Stockyards Act, (7 U. S. C. § 181-229) The Court held that a fair hearing commanded an "opportunity to know the claims of the opposing party and to meet them." Chief Justice Hughes added that the party was entitled to be "fairly advised" and "to be heard" upon the issues. He said that administrative agencies must guarantee "basic concepts of fair play".—304 U. S. at 18, 22. See also *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, 335-336.

The general definition of a hearing in administrative proceedings has been held to be one that had "a quality resembling that of a judicial proceeding. Hence it is frequently described as proceedings of a quasi-judicial char-

acter." (*Morgan* v. *United States*, 298 U.S. 468, 480, 481-482.) See also *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50-51, where the Court said, "It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake."

The Department of Justice contemplates a hearing very much akin to the hearing that is required in judicial or quasi-judicial proceedings. The notice of hearing and the instructions sent to the registrants stated the right to bring witnesses and to have a full hearing.

While the Selective Service Regulations do not permit a registrant to be represented by counsel upon the personal appearance and oral hearing before the local board (§ 1624.1; *United States* v. *Pitt*, 144 F. 2d 169; *Niznik* v. *United States*, 173 F. 2d 328) the courts have held that draft board proceedings are quasi-judicial.—*Gibson* v. *Reynolds*, 172 F. 2d 95 (8th Cir.); *Dodez* v. *Weygandt*, 173 F. 2d 965 (6th Cir.). *Contra United States* v. *Bouziden*, 108 F. Supp. 395.

In *Kwock Jan Fat* v. *White*, 253 U. S. 454, it was held that the suppression or omission of evidence was not a fair hearing. It was pointed out that everything relied upon in the administrative determination must be included in the record.—253 U. S. at 464.

In *United States* v. *Abilene & S. Ry. Co.*, 365 U. S. 274, 290, it was held that a party before an administrative agency must be apprised of all evidence submitted and made a part of the determination.—See also *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.*, 227 U. S. 88, 93.

Recent decisions of the Court state the American historical standard of fair play in requiring that documentary evidence be revealed in an administrative hearing. One of these cases, in which an F.B.I. report had been used as the basis for an administrative determination, was *Joint Anti-*

Fascist Refugee Committee v. *McGrath*, 341 U. S. 123. The Court noted that the petitioner was listed as a subversive organization without a hearing and without having an opportunity to refute the evidence contained in the F.B.I. report. The Court said that the parties "were not informed of the evidence on which the designation rests". (341 U. S. 123) —See also the concurring opinion of Mr. Justice Frankfurter at pages 165, 171-173; and the concurring opinion of Mr. Justice Douglas at pages 175, 177, 179.

The Court, in *Bailey* v. *Richardson*, 341 U. S. 918, by an equally divided court, affirmed the lower court, as to the question of concealment of evidence in the administrative hearing.

It was held that since an employee could be discharged without any reason by the Government, petitioner could be deprived of the evidence in the administrative hearing. See the majority opinion of the United States Court of Appeals in *Bailey* v. *Richardson*, 182 F. 2d 46, where, at page 51, it is said: "Appellant says that the 'evidence' does not include in our jurisprudence, information secretly disclosed to a hearing tribunal. That is certainly true . . ." The dissenting judge in that case, in spite of the fact that it was a matter of government control over employees, said, at page 69: "Aliens are entitled to a fair hearing in deportation proceedings, and this despite the fact that 'there is no express requirement for any hearing or adjudication in the statute authorizing deportation'." This dissent is mentioned, because four justices of the Court dissented in the case dealing with discharge of government employees who have been thought to have no right to protest a discharge nor to demand a reason.

In *Eagles* v. *Samuels*, 329 U. S. 304, the Court approved the use of the theological panel. The panel made a report which was made a part of the file. It was available to the registrant. It was not withheld to the injury of the registrant as here. The Court, speaking through Mr. Justice

Douglas, held that even the information that was received by the special panel and given to the local board, in order to afford due process, had to "be put in writing in the file so that the registrant may examine it, explain or correct it, or deny it. There is, moreover, no confidential information that can be kept from the registrant under the regulations".—(329 U. S. at 313) *Degraw* v. *Toon,* 151 F. 2d 778 (2nd Cir.); *Levy* v. *Cain,* 149 F. 2d 338 (2nd Cir.); *United States* v. *Balogh,* 157 F. 2d 939 (2nd Cir.); judgment vacated, 329 U. S. 692; affirmed on other grounds, 160 F. 2d 999.

The term "opportunity to be heard" has been judicially defined innumerable times. This Court has expressed itself on many occasions as to what due process of law requires on the opportunity to be heard. The Supreme Court of Washington has summarized very well the law on this question. In *Luellen* v. *City of Aberdeen,* 20 Wash. 2d 594, 148 P. 2d 349, the court said:

"The opportunity to be heard has at least three substantial elements: (1) the right to know seasonably the charges or claims preferred; (2) the right to meet the charges with witnesses and evidence; and (3) the right to have the aid of counsel. If any of these rights are denied a party, he does not have a hearing that is conformable to the elementary standards of fairness and reasonableness. No statement of the charges made against the appellant having been given him, nor any notice of any hearing having been given or accorded him, his removal was illegal and of no force or effect."—20 Wash. 2d at p. 607.

This Court said, in *State of Washington* ex rel. *Oregon R. R. & Navigation Co.* v. *Fairchild,* 224 U. S. 510, concerning the requirement of a fair hearing that if "this were true the defendant's position would be correct, for the hearing which must precede the taking of property is not a mere form. The carrier must have the right to secure and present evidence material to the issue under investi-

gation. *It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen but to give legal effect to what has been established".* (Italics supplied)—224 U. S. at p. 524.

In an older case, *Turpin* v. *Lemon,* 187 U. S. 51, at page 57, this Court said that due process of law meant that "it must give them an opportunity to be heard respecting the justice of the judgment sought".

Mr. Justice Frankfurter, in *United States* v. *Lovett,* 328 U. S. 303, concurred in the opinion of the Court. Among other things, he said at page 328: "This experience serves as a powerful reminder of the Court's duty so to deal with Congressional enactments as to avoid their invalidation unless a road to any other decision is barred."

In re *Oliver,* 333 U. S. 257, 264, stated that reasons of expediency "have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail".

While the draft board proceedings do not directly result in fining and imprisonment, the sanctions of the act based on the proceedings do this very thing. The principle stated applies here even though the proceedings are not criminal in nature.

The essence of a full and fair hearing is aptly stated in *Matter of Rothenberg* v. *Board of Regents,* 267 App. Div. (N. Y.) 24. It is there said:

"Although it would not compel the production of these reports or permit petitioner to examine them, the subcommittee which heard the charges examined them during the course of the trial. The reports themselves were not identified and do not appear in the record before us. All this was highly prejudicial to the petitioner."—267 App. Div. (N. Y.) at p. 25.

The Government contends that the court below is inconsistent and that the court below rendered a decision in

the cases at bar directly in conflict with its holding in *Brandon* v. *Downer*, 139 F. 2d 761. The respondents submit that the *Brandon* case can be distinguished.

It appeared in the *Brandon* case that the only piece of adverse evidence contained in the F.B.I. report, which was relied upon by the hearing officer in making his report, was that the registrant had voluntarily taken a physical examination preliminary to a voluntary enlistment into the armed forces after the claim was made. The registrant admitted this fact. There was no question about the need to contradict or reply. He confessed and attempted to avoid the impact of the confession by saying that his wife nagged him into doing it. He said that it was the result of impulse and that he later regained his senses and repented from his backsliding from his conscience. The hearing officer, notwithstanding, recommended the registrant for classification as a conscientious objector. The court of appeals specifically found that there was nothing unfavorable in the F.B.I. report and that the hearing officer relied upon nothing unfavorable in it. (139 F. 2d 765) It was also said that the registrant failed to subpoena the report at the trial. This failure would not raise a presumption of its being unfavorable.

Since the court below decided both cases and in view of the above stated distinction, it is obvious that there existed to the court a difference. The court did not consider there was any similarity or conflict. For this reason it is not proper to say that the court below was inconsistent.

Strong reliance has been put on *Elder* v. *United States*, (No. 13,405, Ninth Circuit, February 24, 1953). This decision conflicts with that of the court below in these cases. If there is any conflict to be found, it seems that the Government could easily locate it in the conflicting holdings made by the Court of Appeals for the Ninth Circuit on this problem in *Chen Hoy Quong* v. *White*, 249 F. 869 (9th Cir.). That court held that the failure to disclose a secret and confidential communication relied on by an immi-

gration hearing officer violated the procedural rights to due process of law. The court set aside an order denying an alien admission to the United States on the ground just stated.—See also *Bachus* v. *Owe Sam Goon*, 235 F. 847, 853; *Chin Ah Yoke* v. *White*, 244 F. 940, 942.

Even where the facts are actually known to the hearing officer, which is not the case here, the administrator cannot base his decision or recommendation upon it.—*Baltimore & Ohio R. Co.* v. *United States*, 264 U. S. 258, permitting a railroad to acquire terminal roads. *Southern R.* v. *Virginia*, 290 U. S. 190, 198. *Market St. Ry.* v. *R. Comm'n of California*, 324 U. S. 548, 562.

In *Degraw* v. *Toon*, 151 F. 2d 778 (2nd Cir.), a draft board order was held to violate due process. The board considered evidence which damaged the registrant. It was a letter from two members of the advisory board. The court held that the opportunity to know and rebut damaging evidence goes to the heart of the controversy.—See also *United States* v. *Kowal*, 45 F. Supp. 301 (D. C. Del.).

An appropriate quotation from a former decision in this Court related to this problem shall now be called to the Court's attention. In *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, the Court said:

"The Act of Congress confers on the Secretary great power, but it is not wholly uncontrolled. It is a power which must be exercised fairly, to the end that he may consider all evidence relevant to the determination which he is required to make, that he may arrive justly at his conclusion, and preserve such record of his action that it may be known that he has performed the duty which the law commands. Suppression of evidence or its concealment from a party whose rights are being determined by the administrative tribunal has been held to be so unfair as to invalidate the administrative proceeding. *Kwock Jan Fat* v. *White, supra; Lewis* v. *Johnson*, 16 F. 2d 180. It

is equally offensive to conceal from the experts, whose judgment is accepted as controlling, facts which might properly have influenced their opinion."

The "experts" there referred to, for the purpose of determining the conscientious objector status, are the members of the appeal board. It is their judgment that is "accepted as controlling facts". Therefore since the recommendation of the Department of Justice "influenced their opinion", it is necessary that the F.B.I. report be produced to the appeal board, the "experts".

The only case under the act that is directly in point on this issue is *United States* v. *Oller*, 107 F. Supp. 54. In *United States* v. *Geyer*, 108 F. Supp. 70, Judge Hincks stated that he agreed with Judge Smith that the withholding of the F.B.I. report was a denial of due process. It is submitted that the holding of Judge Smith that there is a denial of procedural due process in situations of this sort ought to be followed here.

D. Restrictive judicial review in draft cases (since it is confined to the administrative record) requires that the F.B.I. report be produced at the Department of Justice hearing for examination by the registrant and made a part of the administrative records, and this cannot be cured by even a production of it to the district judge in court on judicial review.

Except in the case of legislative agency determinations in practically all of the cases where there has been any restriction or narrowing of the right to see adverse evidence in quasi-judicial hearings of an administrative agency, the law allows a *de novo* hearing in the court on judicial review. This protection of the aggrieved party removes practically all of the injury or damage from the withholding of the evidence or making a determination on evidence not in the file. But such is not the case here. In the case at bar the Court is confronted with an entirely different situation.

It is here appropriate to consider the statement appearing in Davis on *Administrative Law:*

"May administrative procedural deficiencies be compensated for by opportunity for a judicial review which is not de novo? One might suppose that the answer is a clear no, because the party is by hypothesis entitled to a fair hearing on the merits; he fails to get it before the agency because of the procedural deficiency, and he fails to get it before the court because the scope of review is limited. . . .

"'. . . if the court will be strongly influenced by the agency's view, if in spite of the theoretical scope of review the practical inquiry may be into reasonableness rather than rightness, if only the exceptional case can go to court —if for any reason the administrative decision importantly affects the final outcome—safeguards at the administrative stage should be preferred to safeguards provided by judicial review. . . .'

"But a judicial review of a limited scope ought not to be regarded as a substitute for full administrative hearing, and sometimes a theoretical right of review is illusory." —Davis, *Administrative Law,* §§ 75-76, pp. 268, 269, 272, St. Paul, West Publishing Co. 1951.

The defense allowed by *Estep* v. *United States,* 327 U. S. 114, in a criminal proceeding that results from denial of a claim for conscientious objector deferment is restricted. *Cox* v. *United States,* 332 U. S. 442, confines the review to the selective service file. This is no *de novo* inquiry by the court. This demands the production of the F.B.I. report at the hearing in the Department of Justice. The defendant must rely upon the record made in the Selective Service classification proceeding. He has no other proof. It must be produced, since the Court cannot grant a trial *de novo* and cannot weigh the evidence. (*Estep* v. *United States,* 327 U. S. 114; *Cox* v. *United States,* 332 U. S. 442.) If the Department of Justice may conceal the F.B.I. report upon which, in part, it makes a recommendation of classification,

then the limited protection afforded a defendant by the case of *Estep* v. *United States*, 327 U. S. 114, has been withdrawn from the defendant before he gets to court.

The doctrine of *N. L. R. B.* v. *Cherry Cotton Mills*, 98 F. 2d 444, supports the contention here made that strict compliance of the requirements of due process be exacted. A broad and liberal field for the Government to operate in would be permissible if there were a broad and extensive judicial review. Since there is not, the usual extensive review permitted in draft board proceedings, the procedural requirements for the agency, must be complied with. Especially should procedural due process and fair treatment be strictly required. Limited judicial review and no *de novo* hearing in court means strict and limited liberty for the administrative agency in the carrying out of its functions. In *N. L. R. B.* v. *Cherry Cotton Mills*, 94 F. 2d 444, the court said that "the very fact that the Board's findings of fact are to be generally conclusive but *makes it more necessary* that they be made with fairness and according to the safeguards established by law". (Italics supplied)—94 F. 2d 444 at p. 446.

It is plain, therefore, that every reason exists for the courts to be astute to see that every administrative safeguard is strictly complied with. The proceedings are fraught with dangerous consequences to the registrant if he fails to succeed before the administrative agency. He must either refuse to obey and face jail or involuntarily submit to military jurisdiction which is no place for the conscientious objector. It means court martial to every sincere religious objector. These are grave hazards that one should not be subjected to until the law and regulations have been strictly complied with by the administrative agency.—*Ver Mehren* v. *Sirmyer*, 36 F. 2d 876 (8th Cir.).

Should the registrant be a sincere conscientious religious objector and, desiring not to violate his conscience the act was designed to protect, appeal to the civil courts by

refusing to submit to induction, he also finds himself faced with heavy penalties.

Regardless of what course he takes he is confronted with serious difficulties. It is a predicament, indeed. Unless all administrative procedures are complied with there is very little hope of the registrant's getting a right determination of his claim in the administrative agency. If they are not fully granted and should the law and the regulations not be strictly construed in favor of the registrant, he has little hope for relief in the courts, either before induction or after induction. The limited scope of review and the rule confining the courts to the written record of the administrative agency preclude any correction or administration of equity by the courts. In this circumstance there is, accordingly, every reason to insist that the entire administrative proceeding, both before the draft boards and the Department of Justice, be fair, just and complete before any liability for training and service can be found to exist. Strict and limited review requires strict compliance by the Government with the law. This means that the Court should hold that the failure to produce the F.B.I. report makes the record incomplete. This incomplete record shows an unfinished hearing in the Department of Justice and before the appeal board which deprives the registrant of procedural due process of law. It should be so held by the Court, as was held by the court below: "True, the hearing here was not a criminal trial. But its effects on defendant might be fully as important." [N 63]

E. The fact that records of the Department of Justice are confidential and privileged does not outweigh the requirements of procedural due process guaranteed by the Constitution, since the order of the Attorney General must yield to due process—the privilege is waived in the case.

Even though the records sought by the subpoenas are claimed to be confidential by the Attorney General's Order

No. 3229 issued pursuant to 5 U. S. C. Section 22, they must be produced because such documents are a part of and form the basis of the administrative determination and action supporting the indictments questioned by the registrants.

The only time that the privilege of the Department of Justice pursuant to Attorney General's Order No. 3229 (5 U. S. C. 22) has been permitted to override the claim of procedural due process has been in cases where there is a plain showing that the disclosure would endanger the national security.

The Court refused to compel the revealing of evidence that would endanger national security in the case of *United States* ex rel. *Knauff* v. *Shaughnessy*, 338 U. S. 537. But even in such a case two justices thought that the evidence ought to be revealed. Mr. Justice Frankfurter said in his dissent at page 549:

" . . . Congress ought not to be made to appear to require that they incur the greater hazards of an informer's tale without any opportunity for its refutation, especially since considerations of national security, insofar as they are pertinent, can be amply protected by a hearing *in camera* . . . "

Mr. Justice Jackson in his dissent wrote:

"Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace of free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary operations on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected. Cf. In re *Oliver*, 333 U. S. 257, 268. . . . Likewise, it will have to be much more

explicit before I can agree that it authorized a finding of serious misconduct against the wife of an American citizen without notice of charges, evidence of guilt and a chance to meet it."—338 U. S. at pages 551-552.

There is surely no need under the guise of national security to conceal the contents of an F.B.I. report of a conscientious objector. It is not one that may affect national security. After all, the F.B.I. report of the conscientious objector merely deals with a man's daily conduct, his religious practices and his habits. If a question of security or national interest should ever come up in the report of the F.B.I. concerning a conscientious objector, the Attorney General could show it. Then there would be no difficulty in keeping such matters secret. To deprive a man of valuable evidence that may affect his liberty on the ground of mere administrative privilege without some good ground for it is repugnant to free institutions. This was stressed in the concurring opinion of Mr. Justice Frankfurter in the case of *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 at page 172. That was the opinion of Mr. Justice Frankfurter under an order of the Attorney General that required appropriate investigation and determination.

Unless the Govenment can show some legally recognizable ground for refusing to produce the F.B.I. report at the hearing before the Department of Justice, then the F.B.I. report must be produced at such hearing for inspection by the registrant. The reasons why the report of the F.B.I. must be produced have been set forth by the registrant. In opposition to these points the Government argues that Order No. 3229 of the Attorney General is sufficient to overcome the requirements of the Constitution, draft law, regulations and "fair play". However, Order No. 3229 was issued pursuant to 5 U. S. C. Sec. 22. That statute provides that the order shall not be in contravention of law. It has been shown that the due-process clause of the Fifth Amendment requires production of all documents used at a hear-

ing. The draft law requires a hearing. The regulations require a hearing and an opportunity to be heard. Order 3229, as here applied, is, therefore, in contravention of law. The regulations adopted pursuant to the draft law provide that all papers pertaining to a registrant shall be put in his cover sheet (32 C. F. R. § 1621.8). This is a definitive provision adopted for draft registrants and, in violation of that provision, the Government offers Order 3229 to keep a registrant from knowing what the law says he should know.

It is further submitted that Order No. 3229, as construed and applied by the Attorney General in this case, violates the requirement of due process of law, Section 13 (h) of the Selective Service Act of 1948, and Section 3 (c) of the Administrative Procedure Act.

While the Court has held that Order No. 3229 is valid, it has left open for the courts to decide the extent to which the Attorney General may use that order to deprive a party of the right to see and use documents. That was decided in *United States* ex rel. *Touhy* v. *Ragen*, 340 U. S. 462, at 469:

" . . . But under this record we are concerned only with the validity of Order No. 3229. The constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge must await a factual situation that requires a ruling. This case is governed by *Boske* v. *Comingore*, 177 U. S. 459."

In a concurring opinion, Mr. Justice Frankfurter said at page 472: "There is not a hint in the *Boske* opinion that the Government can shut off an appropriate judicial demand for such papers."

The Government gives no specific reason why the report is so confidential that it should not be produced, such as saying that the report has information the disclosure of which might affect internal security or might affect the

interests of the Government in some specific way. A general privilege or departmental order, without a specific reason given, should not be permitted to deprive a party of valuable evidence to which he is entitled by law. This was expressed in the case of *Bank Line* v. *United States*, 163 F. 2d 133 (2nd Cir.), by Judge Clark in a concurring opinion at page 139: ". . . but I think no general statement of prejudice to its best interests can or should be applied to any branch of the government, including the armed forces . . ."

Order No. 3229, on the other hand, has a provision which would seem to allow disclosure of the F.B.I. report to a registrant. That provision does not allow disclosure of the report "for any purpose other than for the performance of his official duties." This would allow disclosure of the F.B.I. report to the registrant because the investigation is made for the hearing before the Department of Justice, at which the registrant is entitled to an opportunity to be heard. The reasons are: (1) it was in the performance of official duty by the hearing officer, and (2) his official duties to both the registrant and the appeal board could not be performed without disclosing all the evidence that he had before him, including the secret F.B.I. report.

Also, since the regulations allow a registrant to see all papers in his file and also require that all papers pertaining to the registrant be put in his file, it would be in performance of duty to let a registrant see the report of the F.B.I. Order No. 3229 should not be allowed to disrupt the long historical recognition of conscientious objection by concealing evidence that Congress meant the registrant to have in his file.

Order No. 3229 ought not to be used as a shield to keep a claimant to conscientious objection deferment from knowing the reason for action taken by the hearing officer and the appeal board. Officials who may not agree with the views of conscientious objection should not be allowed to defeat their claims by secret evidence. Overzealous officials are apt

to express their own conclusions in the facts, if they are permitted to conceal them, in contravention of Section 13 (b) of the Selective Service Act of 1948 and Section 3 (c) of the Administrative Procedure Act.

A practical consideration of the matter is against secret evidence before the Department of Justice. The party who appeals is making a claim as a religious man. If we are going to deny religious men evidence to prove their cases, we are laying a foundation for atheists and low-minded persons to impair the reputation of religious men and to bring religion into disrepute. On this see *Wigmore on Evidence:*

"It is urged, to be sure (as in *Beaton* v. *Skene*) that the 'public interest must be considered paramount to the individual interest of a suitor in a Court of Justice'. As if the public interest were not involved in the administration of justice! As if the denial of justice to a single suitor were not as much public injury as is the disclosure of any official record! When justice is at stake, the appeal to the necessities of the public interest on the other side is of no superior weight. 'Necessity!', as Joshua Evans said, 'is always a suspicious argument, and never wanting to the worst causes'. . . .

". . . If there arises at any time a genuine instance of such otherwise inviolate secrecy, let the necessity of maintaining it be determined upon its merits. But the solemn invocation, in the precedents above chronicled, of a supposed inherent secrecy in all official acts and records, has commonly only a canting appeal to a fiction. It seems to lend itself naturally to a mere sham and evasion."—P. 790.

"But the vast extension, in modern times, of administrative law regulating the affairs of the individual citizen, is presenting a large scope for this claim of privilege. The possibilities of such abuse are plainly latent in this supposed privilege. There is needed only the willingness to exercise them."—P. 791.

"'No nation' (in the words of a great American jurist) 'ever yet found any inconvenience from too close an inspection into the conduct of its officers. But many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses which were imperceptible only because the means of publicity had not been secured.'" —P. 792.

"It's foundation is that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official, which alone is no reason for their non-production."—P. 796. *Wigmore on Evidence* (3rd ed.), pp. 790, 791, 796.

The above great authority, Wigmore, is enough to set at rest any general claim of privilege in the hearing before the Department of Justice. But on the matter of refusing to reveal the identity of informers, we may first ask what an informer is. Generally speaking, an informer is one who discloses to public officials some violation of law. It is natural that such an informer must be protected from reprisal by a law violator. And even such informers are not always protected under the claim of privilege.

The man making a claim for deferment under the conscientious objector provisions of the statute is making a claim as a man of religion. Usually, there is no question of law violation by him. The matter sought for by the Department of Justice is his religious practice and general habits, his character and good faith. This is not a search for law violation. Persons who give information on such matters cannot be called informers, in the true meaning of the word. See again what *Wigmore on Evidence* (3rd ed.) says at sec. 2374 (f) entitled "Privilege for Communications by Informers to Government".

A general refusal to disclose the identity of witnesses in the F.B.I. report in every case may be harmful in many ways. Sometimes there may be adverse evidence based upon difference in religious interpretations. A man might

be attending a church different from the one in which he has membership. A person might draw a conclusion about an objector without knowing him well, but basing his conclusion upon his own predilections. One might be misunderstood or misquoted by the F.B.I. A neighbor might have a son in the military service and try to hurt the case of a conscientious objector who he feels should not have a better status than his son. There are many other reasons that have nothing to do with law violation.

Such matters as names and addresses ought to be disclosed at the hearing before the Department of Justice since law violations are not involved and there is no question of reprisal. A claimant to conscientious objector deferment would quickly reveal his claim as false if he undertook, in some way, to seek reprisals against any witness for the F.B.I.

The argument of the Government that the procedure condemned by the court below is adequate is not borne out by the examples cited to prove this contention. In the first place, a registrant cannot always prove that specific charges are false. If an atheist falsely gives evidence that the registrant had told him that he would fight for Russia, how can the registrant overcome this false evidence without knowing who gave it? It is a question of his word against the liar, and, under the law of limited proof, the liar's word creates a basis in fact which results in a criminal conviction without a chance to prove the untruth of the evidence. This argument also applies to that adverse evidence which tends to show an irreligious or nonpacific state of mind. This cannot be effectively overcome, as contended, by the registrant's demeanor at the hearing, because one cannot judge a person's character on one appearance, nor is favorable evidence sufficient, even if given by those who may have influenced the registrant. As already said, such evidence, even if believed, is counteracted by the adverse evidence which is concealed, and the latter evidence creates a basis in fact for

the classification, which cannot be disputed in court. If an atheist gives false evidence that he saw the registrant carry a gun on a Sunday, he is attacking the religious professions of the registrant and also his conscientious objector claim. There is no way to prevent a conviction on this evidence, except to let the registrant see the F.B.I. report, so that he may be able to meet it.

This Court has even held that an informer of law violations may be identified under certain conditions. See *Scher* v. *United States*, 305 U. S. 251 at page 254: "Moreover, as often pointed out, public policy forbids disclosure of an informer's identity unless essential to the defense as for example where this turns upon an officer's good faith. *Segurola* v. *U. S.*, 1 Cir., 16 F. 2d 563, 565; *Shore* v. *U. S.*, 60 App. D. C. 137, 49 F. 2d 519, 522; *McInes* v. *U. S.*, 9 Cir., 62 F. 2d 180."

If the law, regulations and Order No. 3229 are construed to allow concealment of the F.B.I. report in the administrative proceeding, then the order is being used to evade the spirit and decision in the *Estep* case (327 U. S. 114) and many other decisions. That case contemplated the consideration in the criminal trial of all the evidence used in the classification proceeding. It must be construed as forbidding concealment of a part of the record in the classification proceeding that would have the effect of depriving a defendant of the defenses that the decision said he should have. If the Government may safely conceal the F.B.I. report it is put in the position of sending every conscientious objector to jail on secret evidence. This is clearly against the intention of Congress and the legal history of conscientious objection.

The F.B.I. report is a gathering of testimony and evidence to be used by the hearing officer and Department of Justice in connection with the recommendation made by the department to the appeal board on the bona fides of the claim for the classification as a conscientious objector. When

the F.B.I. report is tendered to the hearing officer for his use in making findings of fact, whatever privilege it enjoyed up to that point was lost and disappeared completely and forever, the privilege having been waived when it was resorted to and relied on to support a recommendation as to the claim of the registrant for classification as a conscientious objector.

United States ex rel. *Touhy* v. *Ragen*, 340 U.S. 462, is not in point. There the proceeding did not involve the Government as a party or a criminal proceeding. (See note 6 of that opinion.) The specific provisions of the Rules of Criminal Procedure authorizing production of documents were not there involved. The decision involved the validity of Order No. 3229 on its face. (See notes 1 and 2 of the opinion for the order and Supplement No. 2.) It is the validity of the order, as construed and applied to the particular facts, that the Court is here concerned with.

The principle which distinguishes the *Touhy* case from this case is well expressed in *Kentucky-Tennessee Light and Power Company* v. *Nashville Coal Company*, 55 F. Supp. 65 (W. D. Ky.) as follows:

"I do not believe that the rule or the statute is applicable to the present case. In both of the cases referred to the federal employee involved was called as a witness and declined to testify. That is essentially different from being a party to the suit where there is a contest between the plaintiff and the defendant involving property which the defendant has taken into his possession."

It has been repeatedly held that Order No. 3229 and 5 U. S. C. 22 do not establish an inexorable privilege and command prohibiting disclosure of the F.B.I. report in judicial proceedings. When it has become material in proceedings brought by the Government, it has been repeatedly held that the privilege was waived and the Government could not successfully refuse to produce the report when demanded. It seems that when it became material in these

administrative proceedings to determine the validity of the registrant's claim for classification as a conscientious objector, for the same reasons the F.B.I. report must be produced. The citizen has the same rights to know the evidence against him before the administrative tribunal as when before the judicial tribunal. The administrative agency stands on no higher level before the Constitution than does the court.

"A prosecutor must, to be fair, not only use the evidence against the criminal, but must not willingly ignore that which is in an accused's favor. It is repugnant to the concept of due process that a prosecutor introduce everything in his favor and ignore anything which may excuse the accused for the crime with which he is charged. It is manifest in this matter that some one identified with the prosecution, as the circumstances indicate very clearly, ignored a very material piece of evidence which, if it had been brought to the attention of the jury or the trial judge, would certainly have resulted in the acquittal of this relator . . . another Judge has said—'Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community.' *Hurd* v. *People*, 25 Mich. 405."—*United States* ex rel. *Montgomery* v. *Ragen*, 86 F. Supp. 382, 387.

The argument of the Government and the cases relied upon by it that the withholding of the F.B.I. statement is proper and required by Order No. 3229 and 5 U. S. C. 22 have been distinguished in *United States* v. *Andolschek*, 142 F. 2d 503 (2nd Cir.). There the court said: "However, none of these cases involved the prosecution of a crime consisting of the very matters nearly enough akin to make relevant the matters recorded. That appears to us to be a critical distinction. While we must accept it as lawful for a department of the government to suppress documents, even when they will determine controversies

between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the document may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave transactions in the obscurity from which a trial will draw them, or it must expose them fully."

The decision by Judge Hand in that case is applicable here. It is supported by reasonable English authority. In *Duncan* v. *Cammell, Laird & Co., Ltd.*, 1942 Appeal Cases 624, the court said:

"In this connection, I do not think it is out of place to indicate the sort of grounds which would not afford to the minister adequate justification for objecting to production. It is not a sufficient ground that the documents are 'State documents' or 'official' or are marked 'confidential'. . . . In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defense, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service."—1942 Appeal Cases at p. 642.

The competence of the document has been established by sources outside the document itself. Under the act and regulations the F.B.I. report is relied on by the officials of the Selective Service System in making their final classification. This situation makes inapplicable the principle

relied on by the Government. (*United States* v. *Krulewitch*, 145 F. 2d 87 (2nd Cir.).) In that case the court said: "But neither of these situations is like that at bar, where the competence of the document appeared without inspection, and inspection was necessary only to fulfill a procedural condition to its admission. In that situation inspection loses its character as a prying into the preparation of the prosecution and becomes merely a means of releasing evidence pregnant with importance in ascertaining the truth."

United States v. *Beekman*, 155 F. 2d 580 (2nd Cir.), involved a prosecution for violations of the OPA regulations. The trial court quashed the subpoena on a motion by the Government. On appeal the court reversed on account of the error. The court said: "We have recently held that when the government institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege."

In *United States* v. *Cotton Valley Operators Committee*, 9 F. R. D. 719 (W. D. La. 1949), the defendants were charged with a violation of the Sherman Act. The defendants moved for discovery under the Rules of Civil Procedure. The Attorney General was ordered to produce all F.B.I. reports and other records relating to the activity of the defendants so that the trial court could determine whether they were privileged as claimed by the Attorney General. On refusal to produce, the trial court dismissed the Government's action. It appealed to this Court. The dismissal was affirmed by an equally divided court.—339 U. S. 940 (1950).

Department of Justice Order No. 229, relied on by the Government in support of its position that it may not be required to produce the documents requested, gets its life from Section 22 of Title 5 of the United States Code. This section provides that the regulations must be "not inconsistent with law".

The regulation, as construed and applied by the Attorney General in this case, is invalid and "inconsistent with law" expressed in Section 1670.17 of the Selective Service Regulations (32 C. F. R. § 1670.17) and in the Federal Rules of Criminal Procedure, Rule 17 (c), as interpreted in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214. The rule is law and has the effect of an act of Congress. (*Beasley* v. *United States*, 81 F. Supp. 518, 527 (E. D. S. C. 1948).) A departmental regulation against disclosure must yield to an Admiralty Rule.—*O'Neill* v. *United States*, 79 F. Supp. 827, 830 (E. D. Pa. 1948). Order No. 3229 must also yield to Section 13 (b) of the Selective Service Act of 1948 and Section 3 (c) of the Administrative Procedure Act.

In *United States* v. *Schine Chain Theatres*, 4 F. R. D. 108 (W. D. N. Y. 1944), it was held that the nondisclosure regulation of the Department of Justice "does not prevent the court from ordering the production of files of the Department of Justice in all cases. There may be certain of such files which are entirely privileged and others which are not".

In *Bank Line* v. *United States*, 163 F. 2d 133 (2nd Cir.), Judge Augustus Hand said: "It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies, which is at the base of our institutions. The existence of government privileges must be established by the party invoking them and the right of government officers to prevent disclosure of state secrets must be asserted in the same way procedurally as that of a private individual." (163 F. 2d 133 at 138) This statement by Judge Hand is in line with what was stated by Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. He said that "Nothing has been presented to the Court to indicate that it will be impractical or prejudicial to a concrete

public interest to disclose to organizations the nature of the case against them and to permit them to meet it if they can." 341 U. S. at p. 172.

The determination of whether the information sought is privileged is not to be made by the Attorney General. That question is to be determined by the court and not the Department of Justice. In *Zimmerman* v. *Poindexter*, 74 F. Supp. 933, 935 (Hawaii 1947), the court said the "clear mandate that all executive regulations be 'not inconsistent with law' circumscribes the power of the entity prescribing the regulation under consideration, and operates to make the applicability and enforceability of a specific department regulation a judicial question for ultimate decision by the court".

This point is further supported by the holding in *Griffin* v. *United States*, 183 F. 2d 990 (D. C. Cir.), where the court said:

"However, the case emphasizes the necessity of the disclosure by the prosecution of evidence that may reasonably be considered admissible and usable to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. 'The United States Attorney is the representative not of an ordinary party to the controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not it shall win a case, but that justice shall be done. *Burger v. United States*, 295 U. S. 78, 88.'"—183 F. 2d at p. 993.

Attorney General Clark recognized that the question of privilege is one for the court to decide rather than for the Attorney General when he, in his Supplement Number 2, June 6, 1947, which clarified Order No. 3229, among other things, wrote: "If questioned the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its

materiality in the case and whether in the best public interests the information should be disclosed."

Recently the Attorney General, however, has instructed all United States Attorneys and all members of the Federal Bureau of Investigation to refuse to produce the F.B.I. statement, even when requested and ordered by the courts. See Order No. 3229 (Revised), dated January 13, 1953, revoking Order No. 3229 (dated May 2, 1939) and Supplements 1, 2, 3 and 4 thereto, dated December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, which allowed the F.B.I. report to be submitted to the court for a determination of whether it should or should not be produced.

This new policy established by Attorney General McGranery is contrary to the established rule of law announced many years ago by this Court. In considering the claim of privilege against producing documents containing trade secrets it has been held that it is a judicial decision for the court to make. Mr. Justice Holmes in *E. I. duPont de Nemours Powder Co.* v. *Masland*, 244 U.S. 100, said: " . . . and if . . . in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge's discretion to determine whether, to whom, and under what precautions the revelation should be made." (244 U. S. at 103) The same rule ought to apply in the determination of the privilege urged by the Government.

Additional cases where the Government has been required to produce documentary evidence are *United States* v. *Grayson*, 166 F. 2d 863 (2nd Cir.); *United States* v. *Coplon*, 185 F. 2d 629 (D.C. D. C. Criminal No. 381-40, 1949); and *Cresmer* v. *United States*, 9 F. R. D. 203 (E. D. N. Y. 1949).—See 59 YALE LAW JOURNAL 1454 (1950).

It is submitted that the F.B.I. report was not privileged and that the constitutional rights of the registrant were violated when it was not produced to him by the hearing officer in each case.

Three

The judgments of the court below in each case should be affirmed for failure by the appeal board to give respondents a lawful classification and because the report of the hearing officer and the recommendation of the Department of Justice violate the regulations, the act and due process of law.

A. Nugent was deprived of his rights on appeal by the hearing officer's making an arbitrary and capricious report against Nugent, in his failing to give Nugent at the hearing a chance to offer material evidence on important matters and in his secretary's telling Nugent prior to the hearing that he need not bring witnesses to the hearing.

The hearing on appeal provided by Section 6 (j) of the act and Section 1626.25 of the regulations should be a full and fair one if the appeal is to mean anything. The instructions should be adhered to by the hearing officer if the registrant is not to be confused.

The hearing officer refused to allow Nugent to give evidence of his conscientious objections to war or when he adopted a full conscientious objector status. This turned the hearing into a mere pretext of a hearing and deprived Nugent of substantial rights. Besides, the hearing officer struck out material testimony of Nugent concerning his religion. This was violative of due process.—See *Kwock Jan Fat* v. *White*, 253 U. S. 454, 459, 463, 464.

The Government argues that the report of the hearing officer was only a recommendation. But a recommendation must be honestly made, so that the matter can be fairly considered by the appeal board that must make the decision. If it were not meant to have a full and fair hearing or if the report of the hearing officer did not matter anyhow, then why was such a careful provision made for an appropriate inquiry and hearing in Section 6 (j) of the act? Congress wanted to protect a registrant on appeal to the extent that he would have full opportunity to prove

his case and the recommendation of the hearing officer had to have relation to the proof adduced. The nature of the proof and report might well influence the appeal board. —See *Morgan* v. *United States*, 304 U. S. 1, 22, 23.

Consolidated Edison Co. of N. Y. v. *N. L. R. B.*, 305 U. S. 197, held at pages 225 and 226:

". . . and the companies also offered the testimony of two other witnesses. . . . The examiner refused to receive this testimony. . . . An offer of proof was made which showed the testimony to be highly important with respect to the reasons for the discharge. It was brief and could have been received at once without any undue delay in the closing of the hearing.

"We agree with the Circuit Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. Assuming, as the Board contends, that it had a discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion."

Pursuant to instructions Nugent went to the office of the hearing officer to learn whether there was anything in the F.B.I. report that might tend to defeat his claim. The hearing officer was away on vacation but Nugent was told by the secretary to the hearing officer that the F.B.I. report was favorable, that he should have no trouble getting his desired classification and that he did not have to bring any witnesses.

This deprived Nugent of an effective appeal, just as did the local board in the case of *Estep* v. *United States*, 327 U. S. 114, when it withheld relevant documents from the appeal board.

Just as relevant evidence was withheld from Estep, so relevant testimony was withheld from Nugent, by advice of the hearing officer's secretary. The trial court took Nugent's evidence on this point but did not give it any weight, as if said that the secretary could not make a binding statement. This was error because the registrant was acting pursuant

to instructions and was lulled into a sense of security not to bring witnesses.

Concerning authority to bind the hearing officer by the secretary's statement, see 2 C. J. S. 1205, and *Hall* v. *Union Indemnity Co.*, 61 F. 2d 85, 91. The hearing officer went on vacation and left his secretary in charge of the office. She must be deemed to have had some authority or she could not have discussed the file and the F.B.I. report.

Nugent had intended to bring his minister to prove his claim before the hearing officer. This turned out to be a pivotal point, because the hearing officer in his report stated that no one gave evidence that Nugent had adopted his views before the Korean situation.

A person appealing a classification should be given an opportunity to have an effective appeal by producing his witnesses. This was provided for in the instructions.

It cannot be said that Nugent had a full and fair hearing when he was deprived of an important witness by the representation of one in charge of an office, however well intentioned the representation may have been.—See *Chin Yow* v. *United States*, 208 U. S. 8, 11, 12.

The recommendation of the hearing officer in the *Nugent* case is, therefore, grounded on arbitrary and capricious conclusions. The recommendation on one point is specifically impeached by the record. It shows that Nugent failed to indicate affiliation with a church with conscientious objection to war. The record shows that Nugent became a member of the Associated Bible Students, March 13, 1945. [N 36]

The record also shows conclusively that the Associated Bible Students are a pacifistic group. They have conscientious objections to participation in war, both combatant and noncombatant service. These objections are grounded upon the Bible and belief in a Supreme Being. They involve duties superior to those arising from any human relation, governmental obligations included. [N 38-45]

While the records show that Nugent had "church affiliations", reliance upon church affiliations as a necessary factor is wrong. Church membership is required by neither the act nor the regulations. Relationship to the Supreme Being can come from sources outside of church memberships. The individual may study religion alone and mold his conscience. The mere fact that the hearing officer relied on church affiliations is just another proof that he proceeded arbitrarily and capriciously.

An erroneous statement was made by the hearing officer. He chose to defy the record. The statement flies into the teeth of the evidence which shows without dispute that Nugent was a conscientious objector since 1945. Yet the hearing officer has the audacity to say that Nugent failed to take affirmative actions prior to the national emergency. He also says that Nugent failed to make any affirmative statements about his conscientious objector status before the national emergency. Nugent had talked to Nichols, a soldier. This man would have testified about his conscientious objections. Nugent also would have brought his presiding minister to testify before the hearing officer. Neither of these witnesses was brought by Nugent because he was misled. He wanted to use the witnesses to corroborate his claim. The secretary of the hearing officer told him that it would be unnecessary to bring witnesses to corroborate his claim. [N 12-14]

The conclusion of the hearing officer is impeached by the letter of the Attorney General to the appeal board. He found that Nugent was religious and attended church meetings regularly (in 1948). This is additional proof that the hearing officer was arbitrary and capricious.

A definite weak spot shows up in the Government's derogation of Nugent's claim for classification as a conscientious objector. The Government, relying on the report of the hearing officer, says that Nugent was not qualified by "church affiliations, religious beliefs, or statements or affirmative actions made prior to the national emergency".

The Government then implies that none of this information was taken from the F.B.I. report. The fact that the hearing officer made no reference specifically to the F.B.I. report on these points does not prove the inference that it did not come from the F.B.I. report.

Much weight is given by the Government to a statement made by the hearing officer in the *Nugent* case. Mr. Gallagher said that Nugent's "references had not made a favorable impression". Just how the references made no favorable impression to the hearing officer is unknown. The references did not go to the hearing. No testimony was given by them orally. They were not interviewed by the F.B.I. agent. The unfavorable impression gained by the hearing officer came through the F.B.I. report. This shows positively that there was unfavorable evidence in the report relied upon by the hearing officer against Nugent.

The Government repeats the conclusion of the hearing officer that the religion of Nugent called "for little effort". This statement by the hearing officer was derogatory. It was an unfavorable conclusion. No evidence that Nugent's religion was easy-going was called to his attention. This "little effort" theory of the Government and the hearing officer came from the F.B.I. report, obviously. How can the Government, in the face of this, say that the F.B.I. report was not derogatory or that it was not developed at the trial to be unfavorable? The "little effort" argument is damaging. It came from the F.B.I. report. It does not appear in any of the draft board records. None of the facts recited by the hearing officer justify this "little effort" conclusion.

The law laid down in *United States* v. *Kauten*, 133 F. 2d 703, 708, was violated by the finding that Nugent did not qualify as to religious affiliations in order to be a conscientious objector to war.

It is needless to labor the point that one does not have to belong to a religious sect or organization to be recognized

as a conscientious objector. Yet the hearing officer held that Nugent did not qualify as to religious affiliation.

The *Kauten* holding was adhered to in *United States* ex rel. *Phillips* v. *Downer*, 135 F. 2d 521. Both are Second Circuit cases.

Even if church affiliation were required, the entire record shows such affiliation with the Associated Bible Students. The finding is, therefore, without basis in fact. This case should be sent back for error of law. That was done in *United States* ex rel. *Reel* v. *Badt*, 141 F. 2d 845 (2d Cir.), where the court said, at page 847: "In other words, he reached a conclusion as a matter of law which was directly opposed to our decision in *U. S.* v. *Kauten*, 133 F. 2d 703."

The conduct of the hearing and the report of the hearing officer show prejudice against Nugent. Prejudice by a hearing officer against a party has no place in an administrative proceeding. Yet the record shows this to be the case here. The refusal to let Nugent give evidence and the striking out of much of his testimony has already been fully covered.

In his report the hearing officer said this about Nugent: "From the impressions gleaned as to this registrant, he is apparently shiftless, lazy, somewhat of a moral weakling —has unusual motion in walking, talking and other mannerisms which give him the appearance of being somewhat if not definitely effeminate." [N 46-47]

In addition, the hearing officer reported: "Registrant's belief seems to be a free and particularly easy belief and religion, calling for little effort and practically no sacrifice." [N 46]

There was nothing in the record to justify any of the remarks adverted to in the two preceding paragraphs. What is more, these things had nothing to do with Nugent's conscientious objection to war and were calculated to prejudice the appeal board against him.

In addition, the hearing officer reported: "As to his

sincerity, the references he produced failed to make favorable impression, and most of them were Conscientious Objectors themselves or members of the same Bible Society." [N 46] This kind of finding is not based on reason but is arbitrary. A member of a Bible society should be expected to produce proof from fellow members of that society. Besides the proof shows that non-members gave favorable evidence for Nugent. [N 48]

The hearing officer did not let Nugent state why he would not salute the flag. This was prejudicial before the appeal board. [N 19]

The hearing officer reported that no statements or actions were attested to by anyone on behalf of Nugent prior to the national emergency. [N 47] But there was testimony that he had spoken to persons, particularly to one Nichols, then in the army, but the hearing officer did not try to fix the date. This report was arbitrary. [N 14]

The hearing officer made a finding that the claim was not founded on truth in fact. This is an arbitrary finding and does not express a reasoned conclusion. The finding was made in the paragraph following criticism of Nugent's personality and in the paragraph in which the rule of the *Kauten* case was flouted. [N 47]

The minutes of the hearing, Government's Exhibit 2-J, show that the hearing officer asked Nugent a question that tended to and did confuse Nugent. The fourth query from the end shows that this question was asked:

"Q. Would you be willing to drive an ambulance in Korea if you didn't have to swear allegiance to the flag?"

"A. No,—yes,—no.—" (See page 96 of the original record filed with this Court.)

Nugent took this question to refer to the army at first and then thought it could mean to drive for a civilian agency because there was no allegiance to the flag, a thing impossible in the army.—See also the closing questions at the hearing to the same effect.

The hearing officer did not stop at the things already mentioned. He even criticized Nugent's spelling in the questionnaire. [N 46] That had nothing to do with his conscientious objection, but the hearing officer still occupied himself with such a flimsy matter.

The facts that evidence was stricken from the record, that the F.B.I. report was never adverted to and that Nugent was told not to bring witnesses are sufficient to justify a finding that the prejudicial statements of the hearing officer had a material effect upon Nugent's classification by the appeal board. And this is true even though the report of the hearing officer is but a recommendation.

B. Packer was deprived of his rights on appeal by the arbitrary and capricious holding of the hearing officer.

This is what the hearing officer erroneously concluded in his report, after stating Packer's training in the Hebrew faith: "Registrant received religious training in a faith which is not opposed to military service and it is quite speculative to assume that such training forms the basis of unwillingness to participate in war in any form.". [P 42]

Section 6 (j) of the Selective Service Act of 1948 was misinterpreted by such conclusion. This law makes no distinction between religions. All religions that qualify under the law must be recognized.—See *Niznik* v. *United States*, 184 F. 2d 972, 974 (6th Cir.).

The holding in *United States* v. *Everngam*, 102 F. Supp. 128 (D. C. W. Va.) is in point. In that case the registrant was a Catholic. The hearing officer before whom he appeared (the same one before whom Nugent appeared)

found that, because the Catholic Church[4] did not have conscientious objector doctrines, Everngam was not entitled to the classification. The court held that this was arbitrary and capricious. The court found that the law protected the conscience of a person regardless of the beliefs of the religious organization to which he belonged. The court said:

"It does not appear that any member of the appeal board felt himself bound by this report and recommendation or how far, if at all, it influenced the decision of the appeal board, but that is not enough. The report and recommendation was transmitted to the appeal board to use as an advisory opinion, and was considered and used (as the regulations require) by the appeal board in its subsequent classification of the defendant. Under such circumstances the prosecution was bound to prove that such invalid report and recommendation of the hearing officer of the Department of Justice did not affect the decision of the appeal board, or any subsequent decision of the local board. No such proof was offered. And had such proof been offered, there is considerable doubt whether such proof would have cured the error, inasmuch as the report and recommendation of the Department of Justice is an important and integral step in the conscription process, for the protection of the registrant, as well as the government. The registrant is entitled to have a report and recommendation that is not arbitrary. Without it he is denied due process of law. Had such a report and recommendation been made, who can say that the hearing officer would not have recommended a different classification, or that the appeal board would not have made a different decision?"—102 F. Supp. at p. 131.

The court acquitted Everngam. The holding in that case

[4] The Association of Catholic Conscientious Objectors during World War II operated conscientious objector camps at Stoddard, New Hampshire, Chicago, Illinois, Warner, New Hampshire, and Owings Mills, Maryland. —Selective Service System, *Conscientious Objection*, Special Monograph No. 11, Vol. II, pp. 283-288, Government Printing Office, 1950.

is directly in point. It ought to be adopted by this Court.

According to the facts stated in the hearing officer's report Packer met the requirements of the law to be recognized as a conscientious objector to war. He was trained in the Hebrew religion and based his opposition to war upon such training and upon a belief in God. [P 42]

The requirement that a person be a member of a conscientious objector religious organization was in the 1917 act. The 1940 act did away with that requirement.—See *United States* v. *Kauten*, 133 2d 703 (2nd Cir.); *United States* ex rel. *Phillips* v. *Downer*, 135 F. 2d 521 (2nd Cir.).

The 1948 act did not restore all the requirements of the 1917 act. The demand that one be a member of a conscientious objector organization was not restored. The only thing that Congress took away from the 1940 act, by the provisions of the 1948 act, was that the conscientious objections, in order to be valid, must be grounded on a belief in the Supreme Being. The act excluded from the conscientious objector provisions political, sociological or philosophical beliefs. It confined the benefits to religious beliefs that imposed duties from God superior to those owed to the state.

Packer stated that his code of morals may well have stemmed from God. Not belonging to a religious organization, Packer wanted to show that religion may come from God, regardless of association or affiliation. He always emphasized his religion. This was in no way lessened by his assertion that he did not know "whether my code of morals will be considered of a religious nature". [P 41]

Nonaffiliation with a religious institution caused that remark, because Packer labored under the wrong idea that he would not be considered religious if he were not a member of a religious organization. The hearing officer fell into the same error.

The hearing officer wrote Packer informing him that one of the objections to his claim for conscientious objector classification was that he was not a member of a religious

sect or organization. This point was pursued by the hearing officer at the hearing when he said, "do you mean that?" It was also stated as a fact in the report of the hearing officer. [P 44]

It is fair to assume that this objection of the hearing officer was one of the factors that motivated his conclusion: "The present case in the opinion of the hearing officer is one in which the registrant has failed to establish by sufficient evidence that his opposition to war arises from religious training and belief." [P 42]

While Packer did say that he was no longer a member of a religious institution, because he could not go along with the ritual, he also said that he considered himself religious. [P 44] The trial court agreed that substance is the important thing in religion. [P 37]

Much could be written to show that there is a minority viewpoint in the Hebrew faith that teaches conscientious objection to war. Some of the teachings will be illustrated to show what these views are. They are enough to bring Packer within the minority viewpoint of non-peace church members and trainees spoken about in Special Monograph No. 11, Vol. I on *Conscientious Objection* by Selective Service System.

The 1931 *Yearbook of the Central Conference of American Reform Rabbis* says that "it is in accord with the highest personal interpretation of Judaism conscientiously to object to any personal participation [in warfare]".

The Rabbinical Assembly of America, being the Conservative Rabbinate of America, has had a standing committee on conscientious objectors to war for the past eleven years and this is its position:

"We recognize the right of the conscientious objector to claim exemption from military service in any form in which he cannot give his moral assent, and we pledge ourselves to support him in his determination to refrain from any participation in it."

The Jewish Reconstructionist Movement has this plat-

form: "Conscientious objection to participation in war on the part of Jewish pacifists who base their objection on adherence to Judaism should not affect their good standing in the Jewish community."

The following is part of an article in the *Universal Jewish Encyclopedia*, Vol. 8, page 341:

"The sacred literature of Judaism arose in eras antedating the conscious formulation of any specific pacifist philosophy. Elements of pacifism appear, nonetheless, in that literature, and a spirit of pacifism colors various Biblical, Talmudic, Midrashic and cognate utterances."

Arnold Toynbee, the renowned historian, in his *Study of History*, Vol. 5, page 75, says:

"What was done for Jesus' followers by the Crucifixion was done for Orthodox Jewry by the destruction of Jerusalem in A. D. 70. . . . Rabbi Johanan ben Zakkai independently took the momentous decision to break with the tradition of militancy which Juda Maccabaeus had inaugurated. . . . In act and word Johanan ben Zakkai was proclaiming his conversion from the way of violence to the way of gentleness; and thru this conversion he became the founder of a new Jewry which has survived (down to the present day). . . . The secret of this latter-day Jewry's extraordinary survival power lies in its persistent cultivation of the ethos which Johanan ben Zakkai has bequeathed to it."

There is a Jewish Peace Fellowship, founded in 1941, to promote a nonviolent way of life among Jews. It teaches that war negates the Fatherhood of God and the brotherhood of man. Being a national organization, it has a membership, including orthodox, conservative, and reform rabbis and Jewish educators. It gives advice to Jewish conscientious objectors, among whom more than one hundred were recognized under the 1940 and 1948 acts.

The Government refers to the recommendation of the Department of Justice finding that Packer's convictions did not result from religious training and belief, but were

based upon "philosophical . . . grounds or upon a personal moral code". In fact, Mr. Peyton Ford for the Department of Justice made his findings upon three opposite conclusions merely to follow the wording of the statute. The Government's brief has merely set forth two of these grounds, omitting the "sociological ground". A finding based upon a conclusion that merely follows the wording of the statute for the purpose of bringing a party within the statute is not a legal finding.

The Government scrambles the evidence about Packer's beliefs. The Government says that his beliefs do not stem from the teachings of any particular person or book. Certainly his beliefs came from the Bible. The Bible is a book like any other book. His beliefs came from early training. It was not necessary for him to name some teacher or instructor. His beliefs came from God. He stated that they "stemmed from the Supreme Being". [P 64]

The Government asserts that Packer "failed to establish that his objection to war arose from religious training and belief". This, however, fails to take into consideration the fact that such a finding was based upon an erroneous conclusion of law made by the hearing officer and his report. The illegal conclusion of the hearing officer was that "registrant received religious training in a faith which is not opposed to military service and it is quite speculative to assume that such training forms the basis of unwillingness to participate in war in any form".

It is, therefore, quite obvious that this finding is without any basis in the evidence. It was made in violation of law. It cannot be assumed from the evidence, therefore, that Packer lacked religious training. It is not necessary to be a church member in order to be a conscientious objector. It is not necessary that the religious organization have principles of conscientious objection to war. The protection extends to the individual irrespective of church membership. Today, more than seventy million people do not belong to any church in the United States. If Congress

had in mind making church membership a prerequisite for conscientious objection it would have said so. We cannot impute an intent to disqualify the conscientious objectors who may be found among the millions of nonchurch members. Without being a church member, a man can still be religious. It is not necessary for people to belong to a church in order to believe in God. There are countless millions of Bibles that are possessed by people who are not church members. A man can believe in God and in the Bible without having been reared in or being a member of a religious organization.

The Government does not properly state the source of Packer's religious guidance. The statement of facts made by the Government discolors the truth. It says that Packer formed his beliefs 'solely from the dictates of his conscience'. This is not true. Packer did not say that this came "solely" from his conscience. He stated that "my religious guidance is the dictates of my conscience". [P 63] The Government is bound by all the other proof including the handwriten statement made by Packer. In this he showed that he had religious training in the Jewish religion and that he had studied the "ten commandments". He said that this early training had "definite bearing on my subconscious". [P 64]

Much reliance by the Government is put on a statement by Packer. He said he did not know whether his code of morals would be considered religious. [P 64] This statement should be qualified by all the rest of the record. When before the hearing officer Packer testified that while he did not belong to any "particular religious organization", "I do consider myself religious". [P 44] The hearing officer added, "I have no doubt of that but I just want to straighten this out". [P 44] The real reason that Packer stated that he did not know whether or not his religious beliefs would be considered religious was because he did not know the law. He said he was uncertain about the requirements of the regulation, but that later he cleared them up. He said then it was that "I felt I come within the law in spite of the fact

that at the time of my objection I was not a member of any religious sect". [P 28] It is plain that the doubt in Packer's mind was not because of his religious belief but because of his misunderstanding of the law and the definition of a conscientious objector.

The Government tries to lift Packer out of the religious field and hem him in by the term "code of morals". His religious belief is not a moral code. His religious belief is founded on the Bible and his limited reading of it. He said that "we are put on earth by the will of God and by the will of God shall we depart". [P 68] This shows that his conscientious objections were not "his own highly developed moral conscience", but that they sprang directly from his belief in the Supreme Being. The obligations that he had, based on his belief in the Bible, are superior to those of any human relation.

The Government would have the Court believe that Packer waited two years to make his conscientious objector claim. It says that this is too long. Packer waited only one year after filing of his questionnaire. The delay was only one year. It was not two years. Packer could say nothing of his conscientious objector status at the registration. When he registered, all he did was to identify himself. The registration would not call for any statements about conscientious objector status.

The Government argues that Packer failed to check Series XIV in the selective service classification questionnaire. [P 58] No point can be made of this. The draft board, at the instance of the New York City Headquarters of Selective Service, mailed Packer the conscientious objector form. Packer explained to the court the reason why he did not check Series XIV. He told the hearing officer the reason he did not state in the questionnaire that he was a conscientious objector was that he did not know the procedure. [P 45] The reason for this was since he was not a member of a religious organization he did not know what the procedure was. He did not know he was entitled to

claim conscientious objection under the law. Packer said that he did not know that his rights would expire "after a certain time". He said he took advice of his friends not to urge the point at the time of filing the questionnaire because he might not pass the physical examination. [P 45] It is obvious that his failure to make a timely declaration of his conscientious objector status was no basis for the suggestion that he was not making the claim in good faith. The mistaken view of the law was not a mistake of fact. His erroneous view of the law could be no denial of the fact that Packer was a conscientious objector. He was, in fact, a conscientious objector. He merely failed to know the procedure to be followed by one not a member of a religious organization.

The test of training by association with the Hebrew faith should not be the determining factor, but the test of Packer's individual training and belief should control. This was the crux of the case and was overlooked by the hearing officer. That is the test applied in *United States* v. *Everngam*, 102 F. Supp. 128. That must be the test under the law and decisions. If it were not, the result would be that one could be a conscientious objector if he did not belong to a religious sect or organization, while one could not be a conscientious objector if he belonged to and were trained in a non-peace church. That would be a discrimination not intended by the law, as shown in the cases of *United States* v. *Everngam*, 102 F. Supp. 128, and *Niznik* v. *United States*, 184 F. 2d 972 (6th Cir.).—See also *George* v. *United States*, 196 F. 2d 445, 448.

Neither the Selective Service System nor Congress interpreted the law in such a way as to restrict it to those trained in peace churches. For an exposition of this view, see *Conscientious Objection*, Special Monograph No. 11, Vol. I, by Selective Service System, 1950, where at page 68, it is said:

"Objection a Personal Matter: The first of these issues

was whether to cover by the provisions of the Burke-Wadsworth bill conscientious objectors other than those who were members of historic peace churches. Such question came up in considering whether to include members of nonpacifist churches since they ordinarily would hold an individual or a minority viewpoint rather than a group or majority approach within their own organizations. This developed into the issue of whether the matter of conscientious objection should be made one at all of personal belief. Eventually the discussion turned to conscientious objectors who had arrived at their conclusions by reason of philosophical, political or economic reasoning. The final decision was to eliminate the church membership requirement entirely, but to qualify the provision by making it apply only to a person 'who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.'"

Since nothing in the record indicates that the Hebrew faith is what the hearing officer says it is, it must be assumed that the hearing officer took "judicial notice" of the teachings of the Hebrew faith. He could have consulted an ecclesiastical panel, as had been done in *United States* v. *Balogh*, 157 F. 2d 939 (2nd Cir.) and in *Eagles* v. *United States* ex rel. *Samuels*, 329 U. S. 304, but this was not compulsory. However, he chose to take "judicial notice". Under the circumstances, he should have told Packer that he was doing that, so that contrary proof could be made. Professor Wigmore points out the danger inherent in taking such notice without so stating at the hearing.—See *Wigmore on Evidence*, Vol. 6, page 257, section 1805; Vol. 9, page 541, section 2569.

Packer did not learn of the hearing officer's decision to take "judicial notice" until the classification by the appeal board and notification thereof by the local board. He never had an opportunity to overcome the wrong conclusion by proof. Under such conditions the expert testimony of

fered by Packer at his trial was necessary to preserve his due-process rights.

Had the Rabbi been permitted to give expert testimony, the Government could have disputed any part with which it disagreed. A party should have the right at some point to offer his proof.

Ministers have been permitted to testify regarding marriage laws.—See *Wigmore on Evidence*, (3rd Ed.) Vol. 2, page 657, section 564, and Vol. 9, section 2569.

There is no good reason why an expert should not be allowed to prove what training one gets in his religion, if that will correct an erroneous interpretation by the Selective Service System. If it has the only right to produce proof or take judicial notice concerning matters of religious training and belief, then one could be classified arbitrarily with no chance to bring himself within the statutory exemption.

It is respectfully submitted that the recommendation of the hearing officer, that since Packer was not a member of a religious organization he was not entitled to the conscientious objector status, is arbitrary and capricious. It vitiated the entire proceedings.

The Government emphasizes the point (on page 3 of the petition for writ of certiorari) that Packer failed to sign the blank in Series XIV of the classification questionnaire, requesting the board to mail him a special form for conscientious objector. It is stated that Packer did not request the special form until October 20, 1950. (See page 3 of the petition.) To begin with, no weight ought to be given to this contention because it was argued in the court of appeals that respondent waived the claim because of these facts. This argument was rejected by the court below. [P 50-51] The Government has not assigned this holding as error. It has not presented this as one of its questions presented. The holding is binding on the Government and is the law of this case as far as the point is concerned.

The holding of the court below on this point was in accordance with the administrative interpretation placed upon the regulations by the New York City Director. [P 17-18, 72-73]

Local Board Memorandum No. 41, issued by National Headquarters, Selective Service System, Washington, D.C., dated November 30, 1951, as amended August 15, 1952, in paragraph 2 states that "a registrant should be considered to have claimed conscientious objection to war if he has signed Series XIV of the classification questionnaire . . . , or if he has filed any other written statement claiming that he is a conscientious objector".

A holding similar to the holding of the court below on this point was made on June 26, 1952, by the United States District Court for the Western District of Pennsylvania. —See *United States* v. *Clark*, 105 F. Supp. 613.

C. The denial by the appeal board of the conscientious objector status to Nugent and Packer was arbitrary, capricious and without basis in fact.

Section 6 (j) of the Selective Service Act of 1948 provides, among other things, that "Religious training and belief . . . means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code."

The documentary evidence submitted by each respondent establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation". This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code", but that it was based upon his religious training and belief.

There is no question whatever on the veracity of Packer. The Department of Justice and the hearing officer accepted his testimony. The appeal board did not raise any question as to his veracity. It merely misinterpreted the evidence. The question is not one of fact but one of law. The law and the facts irrefutably establish that Packer is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing Packer's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove Packer was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

A decision directly in point supporting the proposition made in the *Nugent* case, that the I-A-O classification (conscientious objector willing to perform noncombatant military service) and the determination of the appeal board denying the I-O classification (full conscientious objector), are arbitrary and capricious is *United States* v. *Relyea*, No. 20543, United States District Court for the Northern District of Ohio, Eastern Division, decided May 18, 1952. In that case the district court sustained the motion for judgment of acquittal saying, among other things, as follows:

"I think it would have been more difficult for the court to find the act of the Board was without any basis in fact if the Board had classified this man as I-A rather than I-A-O. They accepted the defendant's profession of sincere and conscientious objections on the religious grounds as being truthful, but they attempted, and in my opinion without any basis in fact, to assert that while he was sincere and conscientious, that sincerity and conscientiousness ex-

tended only to his active aggressive participation in military service and that he was not sincere in his statements that he was opposed to war in all its forms."

This was an oral opinion which is unreported. A printed copy of the stenographer's transcript of the decision rendered by Judge McNamee accompanies this brief.

A similar holding was made by United States District Judge in *United States* v. *Goddard*, No. 3616, District of Montana, Butte Division, June 26, 1952. The court, among other things, said:

"... after due consideration, the Court finds that the evidence is insufficient to sustain a conviction for the reason that there is no basis in fact disclosed by the Selective Service file of defendant upon which Local Board No. 1 of Ravalli County, Montana, could have classified said defendant in Class I-A-O, and therefore the said Board was without jurisdiction to make such classification of defendant and to order defendant to report for induction under such classification."

The above decision was a part of a judgment. No opinion was written. A printed copy of the judgment accompanies this brief.

This case is distinguished from the facts in *Head* v. *United States*, 199 F. 2d 337 (10th Cir.), where the I-A-O classification was held to be proper. In that case the facts showed that the registrant was a member of a church that believed it was right to perform noncombatant military service and that the I-A-O classification was satisfactory. Also facts were present in the *Head* case which impeached the good faith conscientious objections of the registrant. Here the undisputed evidence showed that the religious group that Nugent belonged to were opposed to both combatant and noncombatant military service and that the I-A-O classification was not satisfactory. Nugent was not impeached in his good faith. In the *Head* case there was no subpoena and demand for production of the F.B.I. report and there was no withholding of evidence, as in this case.

The *Nugent* case is similar to *United States* v. *Clare*, 108 F. Supp. 307 (S. D. N. Y. November 6, 1952), where (at the end of the opinion) the court held that the denial of the conscientious objector status was without basis in fact. In the *Clare* case the proof showed that he worked on a defense job and, notwithstanding this, the Assistant Attorney General overruled the adverse report of the hearing officer and recommended that Clare be classified as a full-fledged conscientious objector.

At the time of the final classification there was absolutely no evidence whatever in the draft board file that Nugent was willing to do noncombatant military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was a conscientious objector who was willing to perform noncombatant military service. When he first made his claim respondent suggested that he was willing to do noncombatant military service. He, at all times thereafter, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

The hearing officer and the appeal board make no explanation whatever of the reasons for rejecting the claim that Nugent be placed in Class IV-E as a conscientious objector to participation in both combatant and noncombatant military service.

The hearing officer and the appeal board, without any grounds whatever, compromised Nugent's claim for total conscientious objection and awarded him only partial conscientious objector status. This was directly contradictory to the testimony that Nugent had given to the hearing officer. Respondent explicitly stated in his papers he objected to going into the army.

It was arbitrary for the hearing officer and the appeal board to grant only part of Nugent's claim and his testi-

mony and reject the balance. The board of appeal classified Nugent as one who was willing to serve in the armed forces and perform noncombatant service. This finding flies directly in the teeth of the evidence and the sworn written statements submitted by Nugent. It defied and flouted the law.

The hearing officer and the appeal board should have accepted Nugent's claim for exemption as a total conscientious objector or rejected it. The hearing officer and the appeal board had no authority to compromise his claim. He either was telling the truth and was entitled to IV-E classification (or I-O) or else he was telling a lie and deserved a I-A classification. If the appeal board and the hearing officer demurred to his evidence it accepted the facts and made a determination that was without any basis in fact, arbitrary and capricious.

It cannot be held because Nugent stated in his questionnaire he wanted the I-A-O classification that he was bound by it. It should be remembered that the proof showed he had grown in his religion from the time of his registration. This constituted a change in his status. The court below found a bona fide change at the time of filing his questionnaire from an objector to combatant service (willing to do noncombatant service) in the army to a full-fledged objector to all kinds of military service at the time of the hearing.

It is the law that one not exempt at a previous time may later become exempt. For instance a lawyer may not be deferred at the time of filing a questionnaire. Yet if he gets elected to the bench before classification his change in status entitles him to the newly acquired deferment. (See *Hull* v. *Stalter*, 151 F. 2d 633, at page 635 (7th Cir. 1945).) So it is the duty of the court to determine the status of Nugent at the time of his last classification when he claimed the full conscientious objector status, rather than at the time of first filing his questionnaire when he claimed only partial conscientious objection.

There are no cases by the courts of appeals on this question that are directly in point. There are decisions of the courts of appeals involving cases which presented only the question of whether each registrant was a minister within the definition of the term in the Selective Service and Training Act of 1940. There is a district court opinion that bears directly upon the question involved here. This is the unreported oral opinion rendered by Judge Clifford from the bench, sitting in the United States District Court for the District of New Hampshire, in cause No. 6216, *United States* v. *Konides*, March 13, 1952. In that case the defendant was denied the conscientious objector status. The facts, as far as the evidence appearing in the file on the subject of conscientious objection is concerned, were identical to the facts in this case. A printed copy of the stipulation of fact and oral opinion rendered by Judge Clifford is here referred to and accompanies this brief.—Compare *United States* ex rel. *Phillips* v. *Downer*, 135 F. 2d 521, 525-526 (2d Cir.); *United States* v. *Grieme*, 128 F. 2d 811 (3rd Cir.).

A case closely in point here is *United States* v. *Graham*, 109 F. Supp. 377 (D. C. Ky. W. D. Dec. 19, 1952), where the defendant was a member of the National Guard at the time of his registration and the filing of his original questionnaire. The board had deferred him because of his membership in that military organization. Following this he became one of Jehovah's witnesses. He later filed claims for classification as a minister of religion and as a conscientious objector. The case was appealed to the National Selective Service Appeal Board, which classified him in Class I-A. The classification was set aside as arbitrary and capricious. Read at page 378.

The pivotal decision for the determination of issues raised in draft prosecutions is *Estep* v. *United States*, 327 U. S. 114. The Supreme Court there itemized certain things committed by a draft board "that would be lawless and beyond its jurisdiction". (327 U. S. at page 121) Read what

the Court said about provisions of the act that make determinations of draft boards "final" at pages 121-123.

In note 14 of the *Estep* opinion (at page 123) the Court says that the scope of judicial inquiry to be applied in draft cases is the same as that of deportation cases, and the Court cited *Chin Yow* v. *United States*, 208 U.S. 8; *Ng Fung Ho* v. *White*, 259 U.S. 276; *Mahler* v. *Eby*, 264 U.S. 32; *Vajtauer* v. *Commissioner*, 273 U.S. 103; *Bridges* v. *Wixon*, 326 U.S. 135. In this note the Court added that "is also the scope of judicial inquiry when a registrant after induction seeks release from the military by *habeas corpus*". The Court concluded note 14 explaining the scope of judicial review by citing the opinion of the Second Circuit in *United States* v. *Cain*, 144 F. 2d 944 (2d Cir. 1944). —327 U.S. at page 123.

In the *Estep* case, the Court said that, in reviewing draft board files, judges are not to weigh the evidence to determine whether the classification was justified. A court weighs the evidence only when there is some contradiction in the evidence. There must be some dispute before this burden falls upon the court to determine whether the classification is justified. The Court added, however, that if there is no basis in fact for a classification after a review of the file by a court, it would be the duty of the court to hold that the classification was beyond its jurisdiction. —327 U.S. at page 122.

There is no basis in fact for the classification in each of these cases because there are no facts that contradict the documentary proof submitted by each respondent. The facts established in his case show that he is a conscientious objector to noncombatant service and, therefore, the classification given is beyond the jurisdiction of the boards.

It is respectfully submitted that, if the Court finds against the respondents, the judgment of the court below, nevertheless, must be affirmed. The reason is that the convictions would have been reversed in each case on other

grounds. The judgments of reversal are correct and should be affirmed for the reasons above discussed.—See *United States* v. *Ballard*, 322 U. S. 78, 88.

The grounds presented above under Point Three of the argument were raised in the trial court. They were properly presented to the court below. Under the practice followed in the Court the questions of law presented under this point should be considered and determined in favor of the respondents. Should the Court not consider, however, whether the judgments should be affirmed on other grounds, then it is suggested that the judgments ought to be vacated and the cases remanded to the court below for further consideration of these questions.

Four

Reversible error requiring a new trial was committed by the trial court in the Packer case by quashing the subpoena duces tecum issued to compel the production of the F.B.I. report at the trial.

Conclusion

It is obvious from the study of the legislative history, a reading of the act and a consideration of the Selective Service Regulations that procedural due process is one of the essentials to be followed by the Government in the fair and just selection of registrants for service under the act. This requirement of procedural due process, not having been accepted as far as the Department of Justice is concerned, makes the department liable also to allow due process. There are no reasons why the confidential and privileged nature of the F.B.I. report should prevail over

the requirement of procedural due process, inasmuch as there is no danger to the national security involved in permitting the report to be accessible to the registrant and the appeal board, as well as on any appropriate judicial demand.

While freedom of conscience, guaranteed by the First Amendment, does not make mandatory exemption, it has been historically considered by Congress to provide, as a grant, for freedom from military service by conscientious objectors. The case of the Quakers is well known. (See *Girouard* v. *United States*, 328 U. S. 61.) Even though the Constitution does not exempt conscientious objectors, still the statute provides for their exemption from military service. The fact that the determination is to be made by the Selective Service System, aided by the Department of Justice, does not mean that the registrant claiming that status can be denied procedural due process. It is a uniform practice to require administrative agencies to obey procedural requirements demanded by the Fifth Amendment even when there is no explicit requirement therefor in the administrative statute or regulations.

It is submitted that use of the F.B.I. report and the failure to produce it at the hearing conducted by the hearing officer, so as to enable each respondent to rebut the adverse evidence there, constitute a denial of procedural due process. Respondents say that there are other reasons for the affirmance of the judgments. These have been set forth above.

The judgments should be affirmed. The respondents should remain discharged. In the alternative the judgments should be vacated and the cases returned to the court of appeals for further proceedings.

Respectfully submitted,

HERMAN ADLERSTEIN
79 Wall Street
New York 5, New York

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

Counsel for Respondents

April, 1953.

Appendix A

(Letters from Chairman, Appeal Board for the State of Connecticut, to Department of Justice requesting F.B.I. report in *Pekarski* case, No. 221, October Term 1952, United States Court of Appeals for the Second Circuit.)

APPEAL BOARD FOR THE
STATE OF CONNECTICUT

49 Pearl Street, Room 707
Hartford 3, Connecticut

May 5, 1951

The Honorable Adrian W. Maher
United States District Attorney
135 High Street
Hartford 1, Connecticut

Re: John Pekarski
S. S. No. 6-21-30-26
Local Board No. 21
Rockville, Connecticut

Dear Mr. Maher,

On January 19 of this year, the cover sheet of the above-named registrant was transmitted by us to you for investigation and report, in pursuance of Section 6 (j) of the Selective Service Act of 1948, because the registrant was claiming to be conscientiously opposed to both combatant and noncombatant training and service. Under date of February 28, 1951, you informed us that the Federal Bureau of Investigation had completed its investigation of the case; and that you were that day forwarding the file and the covering report to Hearing Officer Nathan Aaron, at Hartford, for hearing. (Actually, this letter related to the case of Adam Samuel Michalik, S. S. No. 6-21-26-41, as well as the registrant.)

Under date of April 27, 1951, the Department of Justice, acting by Deputy Attorney General Peyton Ford, returned the cover sheet to us, along with the report of Mr. Aaron, who recommended that the registrant's objections "be sustained and that he not be inducted into the armed forces." This report bears the date of April 19, 1951. In the accompanying letter of transmittal, *i.e.*, that of April 27th, Mr. Ford said that his Department concurred in Mr. Aaron's recommendation; and, more particularly, it was recommended that the registrant "be placed in Class IV-E and deferred." This letter in no way discussed the facts on which classification would be predicated, nor was the investigative report of the Department of Justice enclosed.

At our meeting of May 3rd, this case came before our Board for consideration. In view of the amendment to classification procedure made after the date we transmitted the cover sheet to you, and, more particularly, amendment to Section 1623.2, it became necessary for us to consider the registrant's claim of being a minister ahead of his claim of being a conscientious objector (nowadays such a claim would be considered by us before we undertook to transmit the cover sheet to you, indeed it would not be transmitted at all except as the ministerial claim were rejected.) At our meeting of May 3rd, we had considered and we had rejected (four to nothing) the ministerial claim made by the registrant. It was then in order, of course, for us to consider the conscientious objection claim. This we discussed at length but, in the end, concluded that we needed more information and, more especially, more light from the Department of Justice, the Hearing Officer included. Accordingly, the cover sheet is again transmitted to you in the hope that such information will be given, even though further investigation and further hearing prove necessary. You will appreciate, we are sure, the desirability of promptness in this matter, considering that the appeal is already several months old.

To our minds, the report of the Hearing Officer is not only sketchy but was composed under a misapprehension as to the objective of an investigation. In his conclusion, Mr. Aaron makes it plain, by implication if not expressly, that a member of the religious order known as *Jehovah's Witnesses* is, by that very fact alone, a conscientious objector to both combatant and noncombatant training and service, provided only that he be a *bona fide* member; indeed, Mr. Aaron predicates his recommendation on that assumption. If this is true, then all bona fide members of this religious sect would be automatically deferred as conscientious objectors except as they might call for deferment as ministers. One may wonder whether or not, by inference, the Department of Justice is taking the same stand?

Up to now anyway, it has never been our belief or understanding that a *bona fide* member of any religious sect or order was entitled, by the mere fact of such membership, to be classified in either Class IV-E or Class IV-D. Were that true, then Selective Service would, in effect, be giving group deferments, which would certainly be contrary to its normal policy and operation. Moreover, we have never understood that a member of the religious order of *Jehovah's Witnesses* was determined, automatically, to be a conscientious objector. It has been our understanding that this religious order has left to individual conscience the question of conscientious objection even though, as to ministerial exemption, it evidently has and does take the position that all of its members are ministers. (While we have classified one member of this order in Class IV-D, we have not been able to cling to the belief that all members in good standing were ministers within the meaning of the law and, therefore, entitled to placement in that class. As you have already seen, we do not feel that the registrant in this case was entitled to be placed in Class IV-D.)

It seems to us that more attention should have been paid to the text of Section 6 (j) of the Selective Service Act

of 1948; and that we should have been provided with the report, both as to basic facts and conclusions, which would enable us to determine whether or not this particular registrant is a conscientious objector within the meaning of the law.

We should also like to have before us the investigative report of the Department of Justice. The reasons for this are evident, we think, but, apart from that, we have discussed the subject at some length in recent correspondence and consequently feel there is no need here to recapitulate.

Very truly yours,

APPEAL BOARD FOR THE
STATE OF CONNECTICUT
By
Wallace W. Brown, Chairman

WWB:ee
CC to: Deputy Attorney General Peyton Ford
State Headquarters for Connecticut

APPEAL BOARD FOR THE
STATE OF CONNECTICUT

49 Pearl Street, Room 707
Hartford 3, Connecticut

September 17, 1951
(Dictated Sept. 15)

Re: John Pekarski
SS. No. 6-21-30-26
Local Board No. 21,
Rockville, Connecticut
And Fred Carmine Forcellina
S. S. No. 6-17-31-226
Local Board No. 17
South Norwalk,
Connecticut

The Honorable Peyton Ford
Deputy Attorney General
Department of Justice
Washington 25, D. C.

Dear Mr. Ford,

Under date of September 6, 1951, you returned the cover sheet of the registrant first named above to us, with an additional statement from the Hearing Officer, Mr. Nathan Aaron, we having requested further facts and elucidation from him through a letter, dated May 5, 1951, to our District Attorney here, the Honorable Adrian W. Maher; and, under date of September 11, 1951, you returned to us with recommendation, the cover sheet of the second named registrant. I write about these two cases together because they demonstrate what I feel is a failure to supply our Appeal Board, in a full sense, with the sort of information which we believe the Department of Justice could and should supply to us within the intention of Section 6 (j) of the Universal Military Training and Service Act and

which would assuredly be of particular value to us in determining appeals based on claims of conscientious objection; also it seems to me that the Hearing Officer, the same man in each instance, has been under a misapprehension as to his own role, at least in cases involving Jehovah's Witnesses, with the result that his findings and recommendations are of considerably less usefulness than they ought to be.

By now, our expressed desire for an extended finding of the subordinate facts, including your investigative report or a copy of it, will have become an old refrain in your ears. You will remember that I have expressly stressed the desirability of having your investigative report, or a copy of it, since both Hearing Officers in this State have been inclined towards giving excessively skimpy recitals of the subordinate facts. Also, as I have said to you before, we value the recommendations of your own Department and of the Hearing Officer (with which, in our experience, your own recommendations have invariably coincided); yet, at the same time, recommendations made to us are merely opinions or conclusions as to what our decisions should be and we can not, in a proper exercise of our functions, do other than draw our own conclusions—which, perforce, must largely stem from the underlying evidence and subordinate facts.

In a letter or two, you have shown an appreciation of the point of view above set forth, although declining to send us your complete investigative reports on the ground that they are "confidential". Even so, you did undertake to send us abstracts or digests of your investigative reports, and you have, in fact, done so in more than a few instances. Despite this, the cover sheets of the two registrants, above-named, have been returned to us by you without any material whatever from the investigative reports which must have been made. The months which have been consumed in having the Department of Justice investigate

and report on these cases have yielded nothing but the skimpiest sort of statements from the Hearing Officer and your seemingly routine endorsements of his recommendations.

As to the value of your investigative reports—where we have had the benefit of them or digests from them—, I think I can say from recollection that they were decisive in our deliberations in at least two recent cases; and, in this connection, I may say that, in our opinion, those investigative reports did not jibe with the recommendations made by the Hearing Officer.

In our letter of May 5, 1951, above referred to, I particularly made it plain that we would like to have material from the investigative report, as well as further statements and finding from the Hearing Officer. One copy of that letter was sent to you directly, so it presumably is in your files. And, in a letter dated May 28, 1951, to Mr. Maher, with a copy to us, you commented on our letter.

In this same letter of May 5, 1951, about Registrant Pekarski, I said that Mr. Aaron's conclusions were apparently misconceived because he felt that, if a man were a *bona fide* member of the Jehovah's Witnesses sect, he was automatically entitled to be placed in Class IV-E. We rejected Mr. Aaron's views on this because we did not feel, and do not feel that they are sound. I never recall having seen a statement from this sect's headquarters that all Jehovah's Witnesses are *ipso facto* conscientious objectors; on the contrary, it has been evident from several cover sheets that the matter of conscientious objection is for the conscience of the particular individual registrant. Moreover, deferments can not be given in a blanket manner under the law. Each case must be judged on its own merits. If Mr. Aaron had been right in the first place, it would follow that all *bona fide* Jehovah's Witnesses should be placed in Class IV-E; and it would further follow that the same thing would apply to any other religious denomi-

nation or sect which adopted a conscientious objection fallacy. Jehovah's Witnesses *do* claim that all of them are ministers, and they have frequently sought placement in Class IV-D (as is true in the instant cases) on that account. We have never accepted that contention, and I notice that it was specifically rejected by the Circuit Court of Appeals (Fourth Circuit) in the very recent case of *Martin* v. *United States*.

We had hoped that Mr. Aaron would make a new and thorough-going statement, perhaps after fresh hearing, on the subject of the registrant's own individual beliefs. However, in a one-page supplement dated August 28, 1951, he merely undertakes to "clarify" his conclusion of last April 19th by saying that he "feels that the registrant's conscientious objection to war in any form is a result of his religious training and belief and not merely as a bona fide member of the Jehovah Witnesses". He then goes on to say; relative to a subject not before him, that in his opinion the registrant did not qualify for a deferment as a minister. It is manifest that the Hearing Officer gave this matter the most cursory sort of attention, and without benefit of further investigation or hearing; indeed, I am not sure that his present opinion varies at bottom from his former opinions. I think he may still be saying that the registrant individually is conscientiously opposed to war in any form because, in training and belief, he is a Jehovah's Witness.

As to Forcellina, Mr. Aaron again enters the field of ministerial deferment, which he applied to the registrant in view of his ultimate recommendation that the registrant be classified in Class IV-E. Mr. Aaron's entire statement, including his conclusions and recommendations, is contained in a double-spaced document running a trifle over one page, and his actual recital of the facts is contained in a paragraph of eight and one-half lines.

Also as to the Forcellina case, you say in the letter of

transmittal of September 9, 1951, that this Board should have but did not consider the ministerial appeal. Then you went on to say that, to avoid delay, you had gone forward with the conscientious objection investigation and report. Had we failed to consider the ministerial appeal, I am by no means sure that your investigation would have been in order from a legal standpoint, although I express no opinion on that point. The fact is, however, that we did consider the ministerial appeal and rejected it at our meeting of April 12, 1951. This action on our part was specifically mentioned in our letter of April 13, 1951, to Mr. Maher, a letter by which we transmitted the cover sheet to him. We do not understand why that letter is missing from the cover sheet. Certainly there ought to be at least a carbon of that letter in the cover sheet. I may mention that, in transmitting cover sheets to Mr. Maher, our clerk always sends a copy of the transmittal letter as well as the transmittal letter itself.

Very truly yours,

Wallace W. Brown, Chairman
Appeal Board for the State of Connecticut

WWB:ec
cc to State Director, General Novey

APPEAL BOARD FOR THE
STATE OF CONNECTICUT

49 Pearl Street, Room 707
Hartford 3, Connecticut

September 20, 1951

The Honorable Peyton Ford
Deputy Attorney General
Department of Justice
Washington 25, D. C.

Re: John Pekarski
S. S. #6-21-30-26
Rockville, Connecticut

And: Fred Carmine Forcellina
S. S. #6-17-31-226
South Norwalk, Connecticut

Dear Mr. Ford,

In transcribing Mr. Brown's letter of September 17, 1951, to you relative to the two above-named registrants, I made two errors.

Therefore, will you please make the following amendments on page three:

In the paragraph which is concluded on that page, the last word of the third sentence from the end should have been "policy" instead of "fallacy". The last clause should read: "... and it would further follow that the same thing would apply to any other religious denomination or sect which adopted a conscientious objection *policy*."

The first sentence of the last paragraph on that page should read: "As to Forcellina, Mr. Aaron again enters the field of ministerial deferment, which he *denied* to the

registrant in view of his ultimate recommendation that the registrant be classified in Class IV-E.

Please accept my apology for these inaccuracies.

Yours very truly,

Elizabeth Carrington, Clerk
APPEAL BOARD FOR THE STATE OF CONNECTICUT

APPEAL BOARD FOR THE
STATE OF CONNECTICUT

49 Pearl Street, Room 707
Hartford 3, Connecticut
October 3, 1951

Re: John Pekarski
S. S. #6-21-30-26
Local Board #21
Rockville, Connecticut
And Fred Carmine Forcellina
S. S. No. 6-17-31-226
Local Board No. 17
South Norwalk, Connecticut

The Honorable Wm. Amory Underhill
Acting Deputy Attorney General
Department of Justice
Washington 25, D. C.

Dear Mr. Underhill,

I thank you for the summaries of your investigative reports in the above named cases, as transmitted with your letter of September 25, 1951, responding to my letter of September 17th to the Honorable Peyton Ford. I am sure they will prove helpful in our deliberations even though their gist may be but corroborative of the hearing

officer's recommendations as joined in by your Department. You refer to them as "additional summaries" but the files of these registrants disclose no previous ones. You speak of your practice of furnishing Appeal Boards "with information available in this office." I do not know how it has been with other boards but our own experience is variant, as demonstrated not only by the instant cases but also by the fact that we got no investigative reports at all, nor summaries thereof, until we strongly urged that we be given such; and, even now, we are never given your full investigative report in a case but only a summary or digest (with no identification of the investigator and seldom of the one interviewed)—and without so much as a representation that this summary covers all pertinent or important evidence. Considering that your investigations are made for the very purpose of enabling appeal boards to make correct classification of claimed conscientious objectors, and considering that in the World War II period appeal boards were given your full investigative reports in addition to truly comprehensive reports by hearing officers (at least in my recollection), I am baffled by the Department's stand under the current Act.

We are by no means seeking, nor have we sought, to instruct you. Clearly, our Board has no more jurisdiction to instruct you on the character of your reports than you have jurisdiction to instruct us on how we shall prepare our minutes. However, I do once more say that our *desire* is for comprehensive reports promptly rendered. And by "comprehensive reports" I mean, above all, comprehensive recitals of the simon-pure, the subordinate, facts, and the evidence thereof. If Congress had intended that we be governed by your recommendations, it would have said so, in which case our role, if any, would have been that of a rubber stamp. Clearly, your recommendations, highly valued as they are, stand as advisory only. When you remark that the hearing officer has an opportunity to

appraise the registrant by seeing and hearing him—an opportunity which we do not have (but which *is* also enjoyed by the local boards)—, you are citing the traditional reason why appellate courts are loathe to question the subordinate facts (as distinguished from conclusions) found by the trier. I do not undervalue that principle. Still, all appellate tribunals must adjudicate and, in this respect, they particularly insist on being provided with a full recital of the pertinent, subordinate facts. Our function is exclusively judicial and, above all, this means that, *first*, we must decide what the subordinate, or basic, facts are and, *second*, apply the law to those facts.

In the second paragraph of your letter you seem to feel I was wondering why you made no recommendation in reference to the ministerial claim. My point, rather, was that the ministerial issue was never before the hearing officer nor you; nor could it have been under the law. As for our minutes, in the Forcellina case, they recited, without variance from the practice we invariably had followed, that the cover sheet was transmitted to the district attorney here in pursuance of Section 6(j) of the Selective Service Act of 1948. This was on SSS Form #100. The transmittal would not have been made, could not properly have been made, except as the conscientious objection issue was ripe for investigation and report by your Department; and the minute was necessarily an affirmation of that fact. In addition, as said, a covering letter specifically mentioned denial of the IV-D claim. Had it been in the file, as it should have been, no conceivable doubt could have arisen.

Yours very truly,
Wallace W. Brown, Chairman
APPEAL BOARD FOR THE
STATE OF CONNECTICUT

WWB:ec

Appendix B

(Editorial, New York *Herald Tribune*, March 23, 1953, p. 18.)

THE F.B.I. FILES

One of the critical points in the uproar which Messrs. McCarthy and McCarran have raised over the confirmation of Charles E. Bohlen as Ambassador to Moscow is the safeguarding of the Federal Bureau of Investigation files. Secretary of State Dulles gave the substance of the file on Mr. Bohlen to an executive session of the Senate Foreign Relations Committee; but he did not disclose names and sources of the material, explaining that "the President and the Attorney General closely restrict access" to the files themselves.

As Mr. Dulles pointed out, F.B.I. field checks produce "a tremendous mass of reports of interviews with all sorts and varieties of people of undetermined reliability." The persons interviewed are not under oath; they believe that they are speaking in confidence and are free from any rules of evidence such as those which ban mere opinions or hearsay. Much of what they relate may be erroneous, even if supplied in good faith, and the opportunities for prejudice or malice to color the accounts are obvious. All, however, is grist for the field check, to be winnowed and refined by further study. "The investigators' job," to quote Mr. Dulles, "is to find information that is adverse, because it is their business to try to detect anything that is suspicious." When the reports are summarized by the F.B.I. the derogatory material stands out—to emphasize the "danger signals."

This summary, however, is not an evaluation of the worth of the material; that is left to responsible departmental officers. The F.B.I. agents are detectives, not judges. If their reports were made public, either in "raw" form or in summary, they would convey an impression that was not intended. Moreover, the whole technique of field checks

would be jeopardized if the interviews were not kept confidential; those interviewed would become much more cautious and valuable leads would be lost. Even if Congressional committees in executive session had access to the files, there would almost certainly be leaks—indeed, Senator McCarthy's claims to unauthorized knowledge of the files has doubtless already created a real handicap for the F.B.I. What is needed now is not more publicity for F.B.I. material but greater safeguards for information essential to national security. In the wrong hands or too widely disseminated, such information could do irreparable damage to individuals and to the whole F.B.I. procedure.

(Article, New York *Herald Tribune*, March 23, 1953, p. 15.)

MATTER OF FACT

By Joseph and Stewart Alsop

Jenkins' Ear

WASHINGTON

Around the State Department, Charles E. Bohlen is currently called "Jenkins' ear." It may seem an odd name for President Eisenhower's recently nominated Ambassador to Moscow, but the historical allusion is apt all the same.

Jenkins was the British sea captain whose pickled ear brought on a war between England and Spain. The international situation was pretty tense, anyway, when the Spanish government, having captured Jenkins and his ship, cropped his ear as punishment for alleged free-booting in Spanish waters. Jenkins saved the ear, salted it and brought it back to London. There it was shown in the House of Commons as evidence of the evil deeds of Spain. . . .

The case also raises, in acute form, at least two major

issues. It is understood on the highest authority that the most important evidence allegedly damaging to Bohlen takes the form of anonymous letters. One question, therefore, is whether the poison pen is to reign supreme among us, with Sen. McCarthy in the role of king-maker. The other question, of course, is whether President Eisenhower is to be master in his own house, or must yield to the McCarthyite Republican wing.

"Target for tonight, John Foster Dulles; target for tomorrow, Dwight D. Eisenhower," is the way one shrewd Capitol Hill observer has summed up the McCarthy operational plan. Dulles has been driven to fight back already. The signs are that the President is getting ready to fight back too.

(Article, New York *Times*, March 24, 1953, p. 15.)

MAIN ISSUE IN BOHLEN CASE WHO MAY SEE F.B.I. FILES?

Capital is Fearful Lest Precedent Be Set and Others Win Access to 'Gossip'

By James Reston

SPECIAL TO THE NEW YORK TIMES

Washington, March 23—The main issue in the "Bohlen case," now before the Senate, is no longer what happens to the career or reputation of Charles E. Bohlen, President Eisenhower's nominee to be Ambassador to the Soviet Union, but what happens to the confidential files of the Federal Bureau of Investigation. . . .

Mr. Taft spoke out strongly against allowing the full Senate, or even the entire Foreign Relations Committee, to see the F.B.I. report. Such files, he observed, contain all

kinds of gossip and unsubstantiated charges that could not be regarded as dependable "evidence". To disclose them to any large number of Senators, he said, could seriously damage a man's reputation and "destroy the F.B.I." ...

For example, the raw files in the F.B.I. contain every imaginable type of information, including anonymous letters, gossip, hearsay and unsubstaniated rumors of every description. Accordingly, officials were asking here tonight:

What would happen if material of this sort fell into the hands of Senator McCarthy; Senator William E. Jenner, chairman of the Judiciary subcommittee investigating communism in the universities; Representative Harold H. Velde, chairman of the House Un-American Activities Committee, which is inquiring into the same question, and Senator McCarran, the ranking Democratic member of the Judiciary Committee.

(Article, New York *Times*, editorial section, Sunday, March 29, 1953.)

F.B.I. FILES HOLD FACTS AND SOME FIGMENTS, TOO.

Investigators Record Everything and Leave the Evaluation to Others

By Luther A. Huston

SPECIAL TO THE NEW YORK TIMES

Washington, March 28—Washington has been unusually conscious of the F.B.I. and its records this week because of two matters that have been of concern to the Senate and to a House Judiciary subcommittee. The first was the nomination of Charles E. Bohlen to be Ambassador to the Soviet Union. The second was an inquiry into the loyalty of Ameri-

cans employed by the Secretariat of the United Nations.

In the case of Mr. Bohlen the records of the F.B.I. were brought forth to prove to the satisfaction of all but a bitter minority of the Senate that his loyalty and integrity were unimpeachable. He won confirmation. . . .

One result was to focus attention upon the F.B.I. files and revive interest in what goes into them.

The first thing the F.B.I. does on any individual, either in cases involving loyalty and security or in those of applications for positions with the Federal Government, is to make what is known as a "name-check." That means that it looks in its files to find out if it has any reports on a person of that name.

New names are constantly being added to the files and new information about the persons involved.

The F.B.I. reads every issue of The Daily Worker, and other publications regarded as being communistic or having communistic leanings. If a man's name appears in any of these publications as a speaker at a Communist meeting, as the signer of a petition to aid a Communist who is in trouble, as a contributor to Communist funds, or as a participant in any Communist-inspired activity or enterprise, his name and the pertinent data go in the F.B.I. indices. . . .

The F.B.I. receives many letters, some of them signed and some anonymous, pertaining to individuals whose names may be in the files or who the writers of the letters think should be investigated. Some are sober, serious letters; some are obviously epistles written out of pure vindictiveness or by crackpots. . . .

An early step, if a full investigation were called for, would be to check a man's military record, if he had one. His employment record also would be checked, and his credit standing as indicated by records of responsible credit agencies.

A check would be made to determine his political affiliation and voting record. If he were a Republican or a Demo-

crat the files would merely carry a notation that he was registered as a voter of a major party. If he registered as a member of the American Labor party, the party affiliation would be noted by name.

In every community in which a man or woman had ever lived, police records would be checked to learn if they had ever been arrested, what for, and what disposition had been made of their cases.

F.B.I. agents would also go into communities in which a man had lived and ask about him of his neighbors and associates. They would seek to find out what sort of people he associated with, whether he had any bad habits, was emotionally unstable, or was in any way a "questionable" character. . . .

There is no precise definition of what constitutes "derogatory information". Membership in the Communist party or in a Communist front, would be considered "derogatory information" in a loyalty case. So would subscribing to The Daily Worker, contributing to Communist party or Communist front funds, signing a petition for a Communist or a Communist cause, or associating with known Communists or other subversives. . . .

The reports on these checks and inquiries all go into the "raw files" of the F.B.I. as they come from the investigators. Since they are often conducted in various areas and by a number of individuals there may be eight or ten separate reports in the files. . . .

The favorable information about Mr. Bohlen was summarized, however, according to Secretary Dulles, Senators Taft and Sparkman and the F.B.I. All derogatory information was transmitted to Secretary Dulles in full. The detailed derogatory information took up more space in the thirty-page report than the summarized favorable information.

No evaluation by the F.B.I. of either the good or the bad in the report accompanied its transmittal to Mr. Dulles.

It is the ironclad practice of the F.B.I. never to evaluate any of the information it receives from its own investigators or any other source. The head of the agency to which it is transmitted must be the sole judge of the value and relative significance of all the information the F.B.I. gives him.

Rigid adherence to this practice also was testified to at the House subcommittee hearing on United Nations employees.